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CONTINUUM CRIMES:
MILITARY JURISDICTION OVER FOREIGN NATIONALS WHO
COMMIT INTERNATIONAL CRIMES

A Thesis
Presented To

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those
of the author and do not necessarily represent the
views of either The Judge Advocate General's School, the
United States Army, or any other governmental agency.

by Michael A. Newton
Major, United States Army
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44TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1996

CONTINUUM CRIMES:

MILITARY JURISDICTION OVER FOREIGN NATIONALS WHO COMMIT INTERNATIONAL CRIMES

MAJOR MICHAEL A. NEWTON

ABSTRACT: In this thesis, Major Newton examines the sources of international law which support the jurisdiction of United States military commissions over foreign nationals during operations other than war. The legal protections for human rights have evolved since the end of World War II. International law defines some offenses which are crimes throughout the spectrum of armed conflict.

This thesis describes a set of offenses termed "continuum crimes." Continuum crimes are universal jurisdiction offenses which the United States has the legal and constitutional basis to prosecute. Continuum crimes violate international law across the spectrum of conflict. This thesis proposes that Congress amend Article 21 of the Uniform Code of Military Justice to allow military commissions to prosecute continuum crimes when those offenses impact the mission of deployed United States armed forces.

Since the end of the Cold War, United States military doctrine has required non-traditional deployments into areas where ethnic tensions, religious differences, and political turmoil create fertile ground for widespread continuum crimes. During international armed conflicts, American commanders can prosecute foreign nationals who violate the laws of war. An amended Article 21 would provide a fair forum for prosecuting continuum crimes. United States commanders should be able to punish criminal misconduct which adversely affects the operational missions of our armed forces.

CONTINUUM CRIMES:
MILITARY JURISDICTION OVER FOREIGN NATIONALS WHO
COMMIT INTERNATIONAL CRIMES

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CONTINUUM CRIMES: Military Jurisdiction over Foreign Nationals
Who Commit International Crimes

MAJOR MICHAEL A. NEWTON*

Because the sentence against an evil deed is not executed speedily, the heart of the sons of men is fully set in them to do evil.¹

The principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace. An international law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare... Of course, the idea that a state any more than a corporation commits crimes is a fiction. Crimes are always committed only by persons.²

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¹*Ecclesiastes* 8:11 (New King James).

²2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 150 (Nuremberg, Germany, 1947) [hereinafter IMT] (quoting Justice Jackson's opening remarks at the Nuremberg Trials). Justice Jackson went on to note that "[w]hile it is quite proper to employ the fiction of responsibility of a state or corporation

I. Introduction

American military commanders do not have adequate means of punishing persons who commit human rights abuses which impact the military mission. In October 1993, cheering crowds of Somalis dragged the corpse of a United States soldier through the streets of Mogadishu.³ The scene had a ripple effect on America's collective consciousness and conveyed the truth that our soldiers often face enemy elements who ignore the rules regulating armed conflict. Conflicts fueled by ethnic tensions, religious differences, and tribal rivalries have created conditions in which the codified laws of war have not limited the conduct of participants to the conflicts.⁴

for the purpose of imposing a collective liability, it is quite intolerable to let such legalism become the basis of personal immunity. The [London] Charter recognizes that one who has committed criminal acts may not take refuge in superior order nor in the doctrine that his crimes were acts of states." *Id.*

³Keith B. Richburg, *Somalia Battle Killed 12 Americans, Wounded 78*, WASH. POST, Oct. 5, 1993, at A1. President Clinton made the first post-Vietnam awards of the Congressional Medal of Honor to the widows of two soldiers involved in this action. Amy Devroy, *Medals of Honor Given to 2 Killed In Somalia*, WASH. POST, May 23, 1994, at A6. Master Sergeant Gary Gordon and Sergeant First Class Randall Shughart gave their lives in the streets of Mogadishu from a sense of duty and loyalty to their comrades. For a stunning account of the battle and its effect on United States policy in Somalia, see Rick Atkinson, *The Raid That Went Wrong: How An Elite U.S. Force Failed in Somalia*, WASH. POST, Jan. 30, 1994, at A1; Rick Atkinson, *Night of a Thousand Casualties: Battle Triggered U.S. Decision to Withdraw From Somalia*, WASH. POST, Jan. 31, 1994, at A1.

⁴The term "laws of war" denotes a branch of public international law, and comprises a body of rules and principles observed by civilized nations for the regulation of matters

inherent in, or incidental to, the conduct of a public war." BLACK'S LAW DICTIONARY, 1583 (6th ed. 1990). As used in this thesis, the laws of war refers to that body of international law and custom which is applicable in the context of international armed conflicts. Army doctrine consistently refers to the "law of war" as applying "to cases of international armed conflict and to the forcible occupation of enemy territory." DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 9 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]. The core body of the international law of war includes the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59) [hereinafter Convention on Sick and Wounded]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371) [hereinafter Convention on Sick and Wounded at Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3316 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021) [hereinafter Convention on Prisoners of War]; Geneva Convention Relative to the Protection of Civilians in Time of War, opened for signature Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Civilians Convention].

To a lesser extent, the supplemental protocols have evolved into customary international law. See Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims Of International Armed Conflicts, opened for signature at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex I, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of the Victims of Non-International Armed Conflicts, opened for signature at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex II, reprinted in 26 I.L.M. 561 (1987) [hereinafter Protocol II], reprinted in DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949 (1979) [hereinafter DA PAM 27-1-1 PROTOCOLS].

Although ethnic conflicts seldom pose direct threats to American security, United States forces have a vital role in promoting collective security and protecting human rights around the world.⁵ America requires her soldiers to comply with the laws of war anytime they deploy.⁶ During peace operations, American forces often encounter opposing forces who are not bound by the laws of war,⁷ and who disregard

⁵William A. Stoft & Gary L. Guertner, *Ethnic Conflict: The Perils of Military Intervention*, PARAMETERS 30, 37 (Spring 1995) [hereinafter *Ethnic Conflict*].

⁶See DEP'T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM ¶ E(1)(a) (10 July 1979) [hereinafter DOD. Dir. 5100.77] (requiring that United States Armed Forces "shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized") (emphasis added). See also Joint Chiefs of Staff Memorandum MJCS 0124-88, Subject: Implementation of DOD Law of War Program (4 Aug. 1988) (stating that legal advisors will review all operations plans as well as rules of engagement to ensure compliance with the DOD Law of War Program); DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICE, para. 2-1g (3 Feb. 1995) (requiring The Judge Advocate General to review operations plans and rules of engagement for compliance with obligations under international law).

⁷The laws of war apply to all cases of declared war or any other conflict which may arise between the United States and other nations, even if one of the parties does not recognize the state of war. The customary law of war also applies to all cases of occupation of foreign territory by the exercise of armed force. FM 27-10, *supra* note 4, para. 8 (implementing and explaining the provisions of Article 2, Common to the 1949 Geneva Conventions which restrict the application of the codified laws of war to international armed conflicts). See also Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995) (stating that the Geneva Conventions were not "strictly speaking" applicable to United States operations inside Haiti) [hereinafter *Extraterritoriality*].

of Human Rights Treaties]; Larry Rohter, *Legal Vacuum in Haiti is Testing U.S. Policy*, N.Y. TIMES, Nov. 4, 1994, at A34.

One operational distinction among many others is the extent to which United States forces undertake to disarm the civilian populace. During a war, of course, United States forces defeat their enemy on the battlefield, and then take their weapons away if they refuse to lay them down voluntarily. During an other operations, United States forces have repeatedly implemented programs to disarm the civilian population without using illegal force or upsetting the often delicate political balance of the operation. See generally Major General S.L. Arnold & Major David Stahl, *A Power Projection Army in Operations Other Than War*, PARAMETERS 4, 17 (Winter 1993-94) [hereinafter *Power Projection Army*] (describing the difficulties of disarming the Somali population during Operation Restore Hope, and noting that "[a]ny future mission of this type must take into account the extraordinarily complex and difficult process of disarming the civilians of the country if that is part of the mission."); F.M. Lorenz, *Weapons Confiscation Policy During the First Phase of Operation Restore Hope*, in SMALL WARS AND COUNTERINSURGENCIES, 409, 421 (Winter 1994) (describing the early weapons policy in Somalia); Susan L. Turley, Note, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139 (1994) (arguing that United Nations peacekeeping operations are not currently covered by the laws of war and that "[p]eacekeeping forces are left to wander in a legal twilight zone, where they have no clear guidance on exactly what type of mission they are involved in, let alone what the law and the rules of engagement permit. Unless the international community is willing to forego such values as military certainty, adherence to humanitarian norms, and the prevention of future wars, peacekeeping law must be clarified."); But cf. 1971 Zagreb Resolution on the Institute of International Law on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged, 54 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 465-70 (1972), reprinted in 66 AM. J. INT'L L. 465-68 (1972) and DOCUMENTS ON THE LAWS OF WAR 371-375 (Adam Roberts & Richard Guelff eds., 1982) (noting that although the United Nations is not a party to any international agreements on the laws of war, the humanitarian law of war applies to all UN operations "as of right").

applicable rules of humanitarian law.⁸ United States forces have conducted operations in areas where the foreign government either cannot, or will not, enforce international law against its own citizens.⁹ As a result, deployed commanders confront

⁸See, e.g., Major Paul D. Adams, *Rules of Engagement: The Peacekeeper's Friend or Foe?*, MARINE CORPS GAZETTE, Oct. 1993, at 21 (opining that the rules restricting United States forces are ignored and utilized by their opponents to "stack against" American military efforts); John Lancaster, *Mission Incomplete, Rangers Pack Up; Missteps, Heavy Casualties Marked Futile Hunt in Mogadishu*, WASH. POST, Oct. 21, 1993, at A1 ("We played by our rules and he doesn't play by our rules He surrounds himself with women and children and stays in the most crowded part of the city."); David Wood, *U.S. Heads into New War Era- Chronic Violence*, CLEV. PLAIN DEALER, Apr. 3, 1994, at A4 (asserting that the prohibitions of the Geneva Conventions "counted for little in Somalia").

International humanitarian law is defined as the branch of international law dealing with the protection of victims of armed conflict. Jovica Patrnogic, *Human Rights and International Humanitarian Law 1*, in UNITED NATIONS CENTRE FOR HUMAN RIGHTS, BULLETIN OF HUMAN RIGHTS 91/1 (1992). Human rights law and international humanitarian law are distinct fields that converge in places to share a common goal of protecting human beings from suffering. *Id.* at 5. Although the two disciplines overlap in purpose to some degree, they each have a different history, focus, and implementing mechanism. *Id.* at 7.

⁹See generally F.M. Lorenz, *Law and Anarchy in Somalia*, PARAMETERS 27 (Winter 1993-94) (describing the conditions faced by United States forces deployed to Somalia) [hereinafter Lorenz]. For a description of the conditions in Panama prior to the United States invasion in December 1989, see John E. Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31 (1991). The United States cited four grounds for the invasion of Panama. The United Nations General Assembly criticized the invasion as "a flagrant violation of international law and the independence, sovereignty, and territorial integrity of states." G.A. Res. 44/240, U.N. GAOR, 44th Sess., Agenda Item 34, at 1, U.N. Doc. A/RES/44/240 (1989).

gaps in compliance between their forces and foreign nationals who violate clear principles of international law.

American commanders have authority to convene a general court-martial or a military commission to punish foreign nationals who violate the laws of war during an international armed conflict.¹⁰ This thesis argues that Congress should modify the Uniform Code of Military Justice to give deployed commanders authority to prosecute foreign nationals who commit international crimes during operations other than war.

By its very nature, international criminal law evolved from interactions between sovereign states. International law codifies specific offenses through treaties.¹¹ International

¹⁰10 U.S.C. §§ 818, 821 (1995).

¹¹See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 11, 1948, 78 U.N.T.S. 277 (1948) [hereinafter Genocide Convention]. One scholar counted 315 international instruments which cover twenty-two categories of offenses. The categories of offenses, which derive from multilateral or regional sources, and which often derive from multiple international agreements are: aggression, war crimes, crimes against humanity, unlawful use of weapons, genocide, apartheid, slavery and slave related activities, torture, unlawful human experimentation, piracy, aircraft hijacking, threat and use of force against diplomats and other protected persons, taking of civilian hostages, international drug trafficking, international traffic in obscene materials, destruction or theft of nuclear materials, unlawful use of the mails, interference with submarine cables, falsification and counterfeiting, and bribery of foreign public officials. M. Cherif Bassiouni, *Policy Considerations on Interstate Cooperation in Criminal Matters*, 4 PACE Y.B. OF INT'L L. 123, 125 n.8 (1992) [hereinafter *Interstate Cooperation in*

law also recognizes crimes based upon violations of customary international law.¹² Just as the laws of war originated from military practices developed over time,¹³ international

Criminal Matters]. See also M. Cherif Bassiouni, *INTERNATIONAL CRIMES: DIGEST INDEX OF INTERNATIONAL INSTRUMENTS, 1815-1986* (2 vols 1986) (The three post-1985 treaties are the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Servicing Civil Aviation, adopted by the International Civil Aviation Association, Feb. 24, 1988, *reprinted in* 27 *I.L.M.* 627 (1988); Convention and Protocol From the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, *I.M.O. Doc. SVA/CON/15*, *reprinted in* 27 *I.L.M.* 668 (1988); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, *U.N. Doc. E/CONF. 82/13*, *reprinted in* 28 *I.L.M.* 293 (1989)). See *infra* notes 177-190 and accompanying text for a description of the international crimes defined by the Convention on the Safety of United Nations and Associated Personnel.

¹²The clearest instances of customary international crimes are piracy and war crimes. The Charter of the International Military Tribunal of August 8, 1945 annexed to the Agreement on the Prosecution and Punishment of Major War Criminals of the European Axis, 59 *Stat.* 1544, 3 *Bevans* 1238, 82 *U.N.T.S.* 279, *entered into force* August 8, 1945 [hereinafter *London Charter*], recognized that the substantive crime termed "crimes against humanity" proscribed by Article 6(c) arose from "general principles of law recognized by civilized nations." See also *RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES* § 101(2) (1986) [hereinafter *RESTATEMENT*] ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); Roger S. Clark, *Crimes Against Humanity*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 177, 190-94 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990).

¹³Jeffrey F. Addicott & William A. Hudson, *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 *MIL. L. REV.* 153, 177 (1993) [hereinafter *My Lai Lessons*] (describing aspects of ancient Hebrew Law which prohibited torturing persons, mistreating women and children,

criminal law defines offenses as "a result of universal condemnation of those activities and general interest in cooperating to suppress them."¹⁴ Accordingly, any state has jurisdiction to punish international crimes.¹⁵

or harming surrendering foes). This is an important teaching point for lawyers charged with teaching the laws of war to soldiers and officers. The laws of war are not the product of lawyers trying to "stay busy." The rules regulating armed conflict evolved from the practices which commanders throughout history developed and refined. See generally William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 3 (1982) [hereinafter *Command Responsibility*] (noting the author's perception that soldiers developed the laws of war as the cornerstone of military professionalism, and lamenting the fact that

[p]rior to World War II, legal standards for commanders were the practical articulation of the accepted practice of military professionals. This customary international law expressed soldiers' standards which were born on the battlefield and not standards imposed upon them by dilettantes of a different discipline. Undoubtedly, the practicality of these rules led to their general acceptance which in turn was responsible for their codification. Such practical rules were understood and enforced. ... Modern law of war is driven by an idealistic internationally minded community. The soldier sees his iron law of war sweetened, lawyerized, politicized, third world-ized, and made much less practical.

¹⁴ RESTATEMENT, *supra* note 12, § 404 cmt. a.

¹⁵ *Id.* For a fascinating case illustrating the practical application of this principle, see *Demjanjuk v. Petrovsky*, 776 F.2d 571, 579-83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993). When United States courts exercise criminal jurisdiction on the basis of universal jurisdiction, they act for all nations and the nationality of the offender or victim, as well as the location of the offense, are irrelevant. *Id.* at 583. See also *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir.

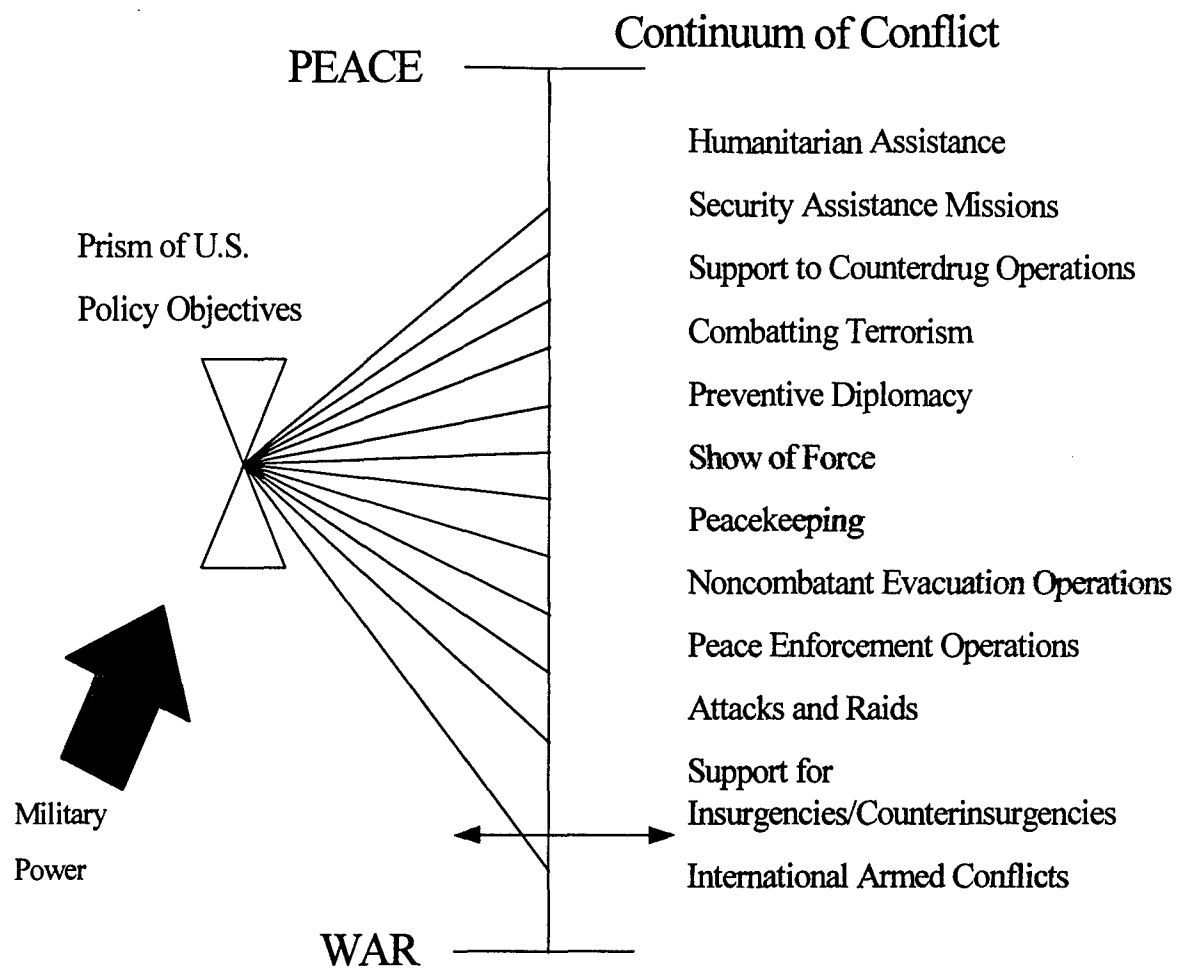


Figure 1

Figure 1 illustrates the range of operations for which United military forces deploy. As Figure 1 shows, the political objective diffuses raw military power into defined, and often overlapping, roles and missions.

Enforcing international law standards in American military courts is not simply an aspirational goal unrelated to the

1991) (upholding jurisdiction over a Lebanese citizen who hijacked a Jordanian airliner in Tunisia).

accomplishment of military objectives. Military doctrine maintains its focus on winning the nation's wars, but also contemplates deployments across a broad array of operations.¹⁶

The necessity for a commander to "direct every operation toward a clearly defined, decisive, and attainable objective" is fundamental to American military doctrine.¹⁷ Wartime objectives can be simply stated. During the Gulf War, for example, the Chairman of the Joint Chiefs of Staff proclaimed

¹⁶DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS (14 June 1993) [hereinafter FM 100-5]; DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS (14 Dec. 1994) [hereinafter FM 100-23].

¹⁷FM 100-5, *supra* note 16, at 2-4. The ultimate purpose of war is to destroy the enemy's forces and will to fight. The ultimate objectives of operations other than war might be more difficult to define, yet doctrine states that "they too must be clear from the beginning." *Id.* Field Manual 100-5 restates the critical importance of defining and pursuing the overall operational objective during operations other than war:

The linkage between objectives of war at all levels of war is crucial; each operation must contribute to the ultimate strategic aim. The attainment of intermediate objectives must directly, quickly, and economically contribute to the operation. Using the analytical framework of mission, enemy, troops, terrain, and time available (METT-T), commanders designate physical objectives such as an enemy force, decisive or dominating terrain, a juncture of lines of communication (LOCs), or other vital areas essential to accomplishing the mission. These become the basis for all subordinate plans. Actions that do not contribute to achieving the objective must be avoided." *Id.*

that "[f]irst, we're going to cut it [the Iraqi Army] off, and then we're going to kill it."¹⁸

On the other hand, peace operations employ military power with discrete discipline designed to create or sustain the conditions under which political or diplomatic activities may proceed.¹⁹ Peace operations require commanders to use military force in a restrained manner which complements diplomatic, informational, economic, and humanitarian efforts designed to achieve the ultimate political objective.²⁰ By the same token, commanders must consider prosecutions of foreign nationals only in light of overall operational objectives. *Army Field Manual 100-23* recognizes that "settlement, not victory is the ultimate measure of success, though settlement is rarely achievable through military efforts alone."²¹ Thus, enforcing international humanitarian law can be an integral part of the commander's overall mission.

¹⁸Tom Post et al., *A Commanding Presence: Colin Powell Reassures Jittery Americans-and Psyched out the Iraqis*, *NEWSWEEK SPECIAL* ISSUE, Spring/Summer 1991, at 83.

¹⁹Brigadier General Morris J. Boyd, *Peace Operations: A Capstone Doctrine*, MIL. REV. 20 (May-June 1995).

²⁰DEP'T OF ARMY, *FIELD MANUAL 100-7, DECISIVE FORCE: THE ARMY IN THEATER OPERATIONS 8-1* (31 June 1993). The manual reminds commanders that operations other than war build on an in-place diplomatic structure which requires special sensitivity and coordination with nonmilitary organizations. As a result, operational-level command and unity of command "may be clouded." *Id.* at 8-5.

²¹FM 100-23, *supra* note 16, at iv.

Two examples from Operation Uphold Democracy illustrate the opportunity and the danger of using military courts to enforce international humanitarian law. On July 31, 1994, Security Council Resolution 940 authorized United Nations member states to form a multinational force and "use all necessary means" to end the military dictatorship inside Haiti and allow the legitimate authorities to return to power.²² United States forces deployed to Haiti with the explicit mission to "establish and maintain a stable and secure environment."²³

On September 20, 1994, Haitian police and militia beat protesting Haitian citizens in full view of American soldiers. At least one person died as a result of the beatings, and the American news media widely publicized the soldiers' failure to intervene.²⁴ Despite the media portrayal of the incident, American commanders requested a change to the rules of

²²S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994) [hereinafter Res. 940].

²³*Id.* ¶ 4.

²⁴See Judy Keen & Paul Hoverstein, *Signs of "Mission Creep" Could Raise Stakes: Another Somalia Feared*, USA TODAY, Sept. 22, 1994, at A3; T.J. Milling, *Haitian Police Savagely Club Demonstrators; Man Beaten to Death at Port; Disgusted G.I.s Forced to Watch*, HOUSTON CHRON., Sept. 21, 1994, at A1; Julian Beltrame, *U.S. Troops Watch as Haitians Beaten; At Least One Killed*, N.Y. TIMES, Sept. 21, 1994, at A1; Mark Matthews, *U.S. Forces Failure to Intervene in Haitian-on-Haitian Violence Raises Questions*, BALTIMORE SUN, Sept. 21, 1994, at A1.

engagement well before the police brutality occurred. The modified rules of engagement would have allowed soldiers to use necessary force against "persons committing serious criminal acts."²⁵ The approved modification to the rules of engagement allowed soldiers to use necessary force to detain persons committing homicide, aggravated assault, arson, rape, and robbery.²⁶ Unfortunately, troops did not receive the revised rules of engagement until September 21, 1994. The media widely reported that the beatings forced the change.²⁷

In this situation, clear jurisdiction to punish foreign citizens under the UCMJ could have helped prevent the human rights abuses by the Haitian police. Protecting the peacefully demonstrating citizens probably would have advanced the commander's mission to establish a stable and secure environment. Human rights treaties establish rights and duties between governments and their citizens, and therefore do not

²⁵See *infra* notes 395-97 and accompanying text for a discussion of the rules of engagement considerations inherent to enforcing standards of international law.

²⁶Operation Uphold Democracy Rules of Engagement Card (21 September 1994) (pocket cards issued to soldiers on the ground) (copy on file with the author).

²⁷Greg McDonald, *Clinton Looses the Leash: U.S. Forces Can Protect Haitians*, HOUSTON CHRON., Sept. 22, 1994, at A1; Douglas Farah, *U.S. Warns Haitian Leaders on Abuses; GI Patrols Stepped Up to Stop Civilian Beatings*, WASH. POST, Sept. 22, 1994, at A1; T.J. Milling, *U.S. Troops Cleared for Deadly Force*, HOUSTON CHRON., Sept. 23, 1994, at A1; Geordie Greig & James Adams, *Sleeping with the Enemy*, SUN. TIMES, Sept. 25, 1994.

require third parties to prevent abuses.²⁸ Nevertheless, the commander on the ground should have had the discretion to intervene in accordance with his assessment of mission requirements. In appropriate situations, the commander could substitute the power of criminal deterrence for the use of military force. Echoing Justice Oliver Wendell Holmes, the mission statement would become the commander's articulation of the "circumstances in which the public force will be brought to bear upon men through the courts."²⁹

At the other extreme, soldiers can be so focused on investigating and remedying alleged human rights violations that they fail to execute their military mission. On the evening of September 30, 1994, an American counterintelligence officer left his place of duty on a self-appointed humanitarian mission.³⁰ Captain Lawrence Rockwood feared that Haitian police inside the National Penitentiary were abusing, killing, and torturing Haitian prisoners.³¹ Captain Rockwood based his fears solely on speculation. By going to the penitentiary,

²⁸See Richard B. Lillich, *Human Rights*, in JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 671, 720 (1990).

²⁹*American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

³⁰Francis X. Clines, *American Officer's Mission for Haitian Rights Backfires*, N.Y. TIMES, May 12, 1995, at A1; Charley Reese, *Americans, Don't Tolerate Injustice Done to Fine U.S. Serviceman*, ORLANDO SENTINEL, Jan 5, 1995, at 12.

³¹*Id.*

Captain Rockwood diverged from the stated mission of establishing a "stable and secure environment,"³² and pursued his own agenda rather than that of the commander.

The commander convened a court-martial against Captain Rockwood for being absent from his place of duty without leave, and disobeying a lawful order.³³ After the prosecution proved the case, the court-martial convicted Captain Rockwood because he could produce no witnesses to support his contentions. Captain Rockwood admitted at trial that he had no information about human rights abuses before he arrived at the prison.³⁴

At the time of the misconduct, the situation in Haiti was tense. Colonel (Ret.) Richard Black described the potential consequences of Captain Rockwood's misconduct by telling Congress that "the potential for a widespread outbreak of

³²Res. 940, *supra* note 22, ¶ 4.

³³*Id.* See also Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. (forthcoming Summer 1996). Other charges included a second charge of absence without leave, disrespect to a superior commissioned officer, and conduct unbecoming an officer and a gentleman. Except for the conduct unbecoming charge, the other charges arose from Captain Rockwood's conduct on October 1, 1994. *Id.*

³⁴Bob Gorman, *The Media and Capt. Rockwood*, WATERTOWN DAILY TIMES, Dec. 3, 1995, at F6-F7 (reporting the facts of the case, describing the widespread media attention given to the case, and relating that as he left for the penitentiary Captain Rockwood left a note reading "[n]ow you cowards can court-martial my dead body.").

violence was substantial. A misstep at that moment might have set in motion a chain of events leading to the loss of American lives and the collapse of the entire mission."³⁵

Ironically, the day before Captain Rockwood left his place of duty, someone killed sixteen Haitians by throwing a hand grenade into a crowd.³⁶ Instead of obeying his superior's orders to collect intelligence on the incident with genuine potential to destabilize the mission, Captain Rockwood embarked on a solitary effort to accomplish his own goals. The logical corollary is that while prosecuting international crimes in military courts could be a valuable tool, commanders must link prosecution to the overall objectives of the operation.

Prosecution of suspected criminals is one way in which the commander orchestrates military force to accomplish the mission.³⁷ Between the extremes of ignoring gross abuses on the one hand, and recklessly chasing phantom abuses on the

³⁵*Human Rights Violations at the Port-Au-Prince Penitentiary: Hearing Before the Subcomm. on the Western Hemisphere of the House of Representatives Comm. on International Relations, 104th Cong., 1st Sess. 27 (1995) [hereinafter Human Rights Hearings], reprinted in CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995 342 (1995). See infra note 423 and accompanying text for analysis of the lack of affirmative duties imposed on commanders to remedy human rights abuses.*

³⁶Gorman, *supra* note 34, at F7.

³⁷*Human Rights Hearings, supra* note 35.

other, commanders should have another tool to help achieve national objectives. Statutory authority to prosecute selected cases could be a valuable option which is currently unavailable.

Part II of this thesis will describe the shortcomings of the current UCMJ with respect to its usefulness in punishing persons who violate international law. Part III will detail the functions that expanded jurisdiction over foreign nationals could serve within the context of modern military doctrine. Part IV will review the international and domestic grounds for expanding the role of military courts. Part V will analyze the scope of presently developed international legal authority. International law criminalizes conduct across the full spectrum of military operations. The term continuum crimes describes the class of offenses which violate international law across the spectrum of conflict. Military tribunals should have authority to prosecute foreign nationals in furtherance of the operational objectives.

Amending the UCMJ would not create new international crimes. To the contrary, clear authority to prosecute continuum crimes would give United States policy makers a venue in which to enforce already existing jurisdictional rights. Continuum crimes include the range of international prohibitions which are criminal offenses across the spectrum of

conflict. War crimes are thus a subset of the class of continuum crimes.

Part VI discusses the mechanisms available for punishing continuum crimes. Military commissions are the only viable forum for prosecuting continuum crimes which reap the potential policy benefits for deployed American forces. Because the United States has jurisdiction under international law, Part VI also explores the reasons why exercising that jurisdiction could support American policy interests. Finally, Part VII specifies changes to the UCMJ which are needed to implement the recommendations of this thesis.

II. Jurisdictional Gaps Of the Current Code

The practice of using military forums to punish criminal violations of international law is deeply rooted in American jurisprudence. The United States Constitution specifies that Congress has the power to "define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations."³⁸ As a practical matter, jurisdiction over

³⁸U.S. CONST. art. I, § 8, cl. 10. The origins of the clause are relatively obscure. The only recorded mention of this clause during the Constitutional Convention debates were an expressed concern that the new Federal government be able to enforce international law obligations and a dispute over whether the clause's language made a claim to unilaterally define international law. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 148 n.234 (1995).

international crimes is meaningless if United States courts lack a jurisdictional basis to allow enforcement in domestic law.³⁹ However, the fact that United States forums apply domestic law to enforce international rules does not diminish the status of the violations as international crimes.⁴⁰ The UCMJ is the only domestic statute in which Congress establishes United States judicial power to punish violations of the law of war.⁴¹

The nature of modern military deployments,⁴² coupled with the changing scope of humanitarian law,⁴³ restricts the

³⁹RESTATEMENT, *supra* note 12, §§ 402-04, 421-23. For an analysis of the process by which states acquire universal jurisdiction over some criminal offenses see Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

⁴⁰Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 563 (1995). Hersch Lauterpacht explained that universal jurisdiction simply allows each state to use its domestic law as a tool for enforcing the law of nations. He wrote that "[w]ar criminals are punished, fundamentally, for breaches of international law. They become criminals according to the municipal law of the belligerent only if their action ... is contrary to international law." Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 64 (1944).

⁴¹See *infra* notes 42-91 and accompanying text for a discussion of applicable UCMJ provisions and the limitations of the current statutory language.

⁴²See *infra* notes 92-143 and accompanying text for a discussion of the evolving nature of United States military deployments and the doctrinal changes necessitated by modern international developments.

usefulness of the existing code provisions. Current UCMJ provisions limit jurisdiction of military forums to violations of the "law of war."⁴⁴ Existing statutes only cover offenses

⁴³See *infra* notes 144-296 and accompanying text for a discussion of the developing international legal prohibitions applicable in previously sovereign internal matters. For a discussion of the norms applicable to internal conflicts see generally Meron, *supra* note 40; Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589 (1983) [hereinafter *Inadequate Reach of Humanitarian Law*]; Asbjorn Eide et al., *Combatting Lawlessness in Eide et al. through Minimum Humanitarian Standards*, 89 AM. J. INT'L L. 215 (1995); James A.R. Nafziger, *The Security of Human Rights, A Third Phase in the Global System*, 20 CAL. W. INT'L L.J. 173 (1990).

⁴⁴10 U.S.C. §§ 818, 821 (1995). On May 5, 1950, Congress revised the Articles of War by enacting the Uniform Code Of Military Justice, Pub. L. No. 81-506, 1950 U.S.C.C.A.N. (64 Stat.) 2222 (codified as amended at 10 U.S.C. §§ 801-946 (1995)). The Second Continental Congress passed the original Code of 1775 on June 30, 1775. The Code of 1775 was based largely on the British Code of 1774. On September 20, 1776, Congress enlarged and modified the existing Code. Congress amended the Code of 1776 in 1786, and the amended Code continued in force after the ratification of the United States Constitution by virtue of amendments "so far as the same are applicable to the Constitution of the United States." *Id.* The revised Code of 1806 contained 101 articles, with an additional article relating to the punishment of spies. Congress revised the Articles of War several times over the years, and subsequently superseded the Articles of War by passing the Uniform Code of Military Justice (UCMJ). See generally *Hearings Before the Committee on Military Affairs, House of Representatives*, 62d Congress, 2d Sess., H.R. 23628 Being a Project for the Revision of the Articles of War.

The President implements the UCMJ through a series of executive orders which together compose the *Manual for Courts-Martial*; See *Manual For Courts Martial, United States* (1995 ed.) [hereinafter *MCM*] (composed of Exec. Order No. 12,473, 49 Fed. Reg. 17152 (Apr. 13, 1984), as amended by Exec. Order No.

committed by persons not "subject to the Code" if those crimes occur during an international armed conflict, or during United States occupation of enemy territory following an international armed conflict.⁴⁵

12,484, 49 Fed. Reg. 28825 (July 13, 1984) (Change 1); Exec. Order No. 12,550, 51 Fed. Reg. 6497 (Feb. 19, 1986) (Change 2); Exec. Order No. 12,586, 52 Fed. Reg. 7103 (Mar. 3, 1987) (Change 3); Exec. Order No. 12,708, 55 Fed. Reg. 11353 (Mar. 23, 1990) (Change 4); Exec. Order No. 12,767, 56 Fed. Reg. 30284 (June 27, 1991) (Change 5); Exec. Order No. 12,888, 58 Fed. Reg. 69153 (Dec. 23, 1993) (Change 6); Exec. Order No. 12,936, 59 Fed. Reg. 59075 (Nov. 10, 1994) (Change 7); Exec. Order No. 12,960, 60 Fed. Reg. 26647 (May 12, 1995) (Change 8)).

⁴⁵FM 27-10, *supra* note 4, paras. 7-14. General courts-martial may try any person who by the law of war would be within the jurisdiction of a military tribunal. MCM, *supra* note 44, R.C.M. 201(f)(1)(B)(i). The Manual defines this class of persons as those who violate the law of war, or the law of the occupied territory whenever United States forces have superseded the authority of local officials as an exercise of military government. *Id.* The International Committee of the Red Cross "underline[d] the fact that, according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict" Unpublished Comments, *quoted in* Meron, *supra* note 40, at 559.

The concept of exercising jurisdiction over such a broad class of persons is unique to the UCMJ. The UCMJ applies worldwide, MCM, *supra* note 44, R.C.M. 201(a)(2), and extends punitive power over any act proscribed by the Code without additional subject matter limitations. *Solorio v. United States*, 483 U.S. 435 (1987). However, the UCMJ generally applies only to a strictly defined group of United States citizens. UCMJ, *supra* note 44, art. 2. Some military scholars may feel uncomfortable in modifying the UCMJ to allow jurisdiction over foreign nationals who would not otherwise be subject to its provisions. The key to overcoming those objections is to remember that prosecuting continuum crimes would help the commander accomplish the mission, which is precisely the purpose for having a separate system of military

However, most United States deployments involve operations which do not rise to the level of international armed conflict. In effect, existing statutes extend domestic jurisdiction only to a subset of the offenses which violate international humanitarian law. There is a wider range of international crimes which are beyond the jurisdictional limits of the current UCMJ, but which could seriously impact a deployed commander's mission. Thus, a leading scholar noted that "[A]lthough the U.S. authority under international law is, in my view, clear, the U.S. statutory authority to prosecute is less so."⁴⁶

A. *Jurisdiction of Military Commissions*

The practice of using military commissions to punish violations of international law dates back to at least 1688.⁴⁷ Since the nations of the world developed the laws of war in response to military requirements, the nearly simultaneous

justice. See *Chappel v. Wallace*, 462 U.S. 296 (1983); *Parker v. Levy*, 417 U.S. 733 (1974); S. REP. NO. 53, 98th Cong., 1st Sess. 2,3 (1983).

⁴⁶Meron, *supra* note 40, at 565 n.64.

⁴⁷See *Articles of James II*, art. LXIV, reprinted in COL. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 919-28 (2d. ed. 1920). Subsequent military codes restated the legality of using military commissions to punish violations of the laws and customs of war. See, e.g., *British Articles of War of 1765*, art. II, § XX, reprinted in WINTHROP, *supra*, at 931.

development of tribunals to enforce those laws is completely logical. In United States practice, military commissions originally developed as "common law war courts."⁴⁸

In 1916, Congress added Article of War 15 to specifically recognize that commanders could prosecute violations of the law of war in either general courts-martial or military commissions.⁴⁹ During hearings on the proposed amendments, Major General Enoch Crowder, The Judge Advocate General of the Army, adamantly testified that statutory court-martial jurisdiction "saves to these war courts [military commissions] the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient."⁵⁰

⁴⁸In 1916, Congress held extensive hearings on revising the existing Articles of War. The revised articles added article 2 which defined the class of persons who would be subject to the jurisdiction of military courts-martial. The Judge Advocate General of the Army repeatedly reminded Congress that military commissions had jurisdiction under international law which would not change as a result of amending the American Articles of War. *Hearings on S.3191, Subcommittee on Military Affairs of the Senate, 64th Cong., 1st Sess., reprinted in S. REP. 230, 64th Cong., 1st Sess.(1916).*

⁴⁹*See infra* notes 85-87 and accompanying text.

⁵⁰*In re Yamashita*, 327 U.S. 1, 66, (1946) (quoting *Hearings on S.3191, Subcommittee on Military Affairs of the Senate, 64th Cong., 1st Sess., reprinted in S. REP. 230, supra* note 48, at 40, 64th Cong., 1st Sess). In earlier testimony before Congress, General Crowder explained that:

Article 21 of the current UCMJ derived from Article of War 15.⁵¹ After restating the concurrent jurisdiction of general courts-martial and military commissions, Article 21 provides that military commissions may convene "with respect to

[t]he next article, No. 15, is entirely new, and the reasons for its insertion are these: In our War with Mexico two war courts were brought into existence by the orders of Gen. Scott, viz. the military commission and the council of war. By the military commission, Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars, its jurisdiction has been taken over by the military commission, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code, the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase "Persons subject to military law." **There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by the statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.**

S. REP. No. 229, 63rd Cong. 2d Sess., at 53 (emphasis added) (General Crowder testified in exactly the same language to the House of Representatives Committee on Military Affairs on May 14, 1912, *id.*, at 28-29).

⁵¹Robinson O. Everett & Scott Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 515 n.34 (1994).

offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."⁵² Given General Crowder's testimony that the military commission is an institution of greatest importance in time of war,⁵³ commanders could construe Article 21 broadly.

During operations other than war, commanders could view military commissions as an aspect of their inherent authority to prosecute any offender for any violation of international law which impedes the military mission.⁵⁴ However, despite the circular language of the UCMJ, history and judicial precedent

⁵²10 U.S.C. § 821 (1995). Article of War 15 originally read as follows:

The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the laws of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

An Act Making Appropriations for the Support of the Army for the Year ending June Thirtieth, Nineteen Hundred and Seventeen, and for other purposes, Pub. L. No. 242, 39 Stat. 653, art. 15 (1916).

In the 1920 amendments to the Articles of War, Congress inserted the words "by statute" before the words "by the law of war" and omitted the word "lawfully". Yamashita, 327 U.S. at 64.

⁵³Id. at 66 n.31.

⁵⁴Interview with Lieutenant Colonel (Ret.) H. Wayne Elliott (Jan. 6, 1996).

show that military commissions have jurisdiction only in the context of what was historically termed war, which in the current vernacular translates to international armed conflicts.

In the American experience, commanders have convened military commissions to prosecute persons not otherwise subject to military discipline who violate international law. After occupying Mexico in 1847, General Winfield Scott convened "councils of war" to try Mexican citizens who violated the laws of war.⁵⁵ The American military tribunals arose "out of usage

⁵⁵Winthrop, *supra* note 47, at 832-33. The experience in Mexico is the first and only time the term "councils of war" appeared in American history. The war councils tried offenders who committed guerilla warfare, violated the laws of war as guerillas, or enticed American soldiers to desert. The War Courts employed procedures "not materially differing" from the military commissions conducted at the same time. *Id.* General Order 20, Army Headquarters at Tampico, Mexico, Feb. 19, 1847, reprinted in *Military Orders-Mexican War*, NARG (entry 134) (as amended by General Orders 190 and 287) provided that

Assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault or battery, robbery, theft, the wanton desecration of churches, cemeteries, and the destruction, except by order of a superior officer, of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against such individuals, or against Mexicans or civilians; as well as the purchase by Mexicans or civilians in Mexico, from soldiers, of horses, arms, ammunition, equipments or clothing" should be brought to trial before "military commissions.

See also A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 833 (1948).

and necessity" and contributed to the successful occupation of Mexico.⁵⁶ Administering occupied territory in Mexico, commanders convened military commissions to punish Mexican citizens for offenses such as theft,⁵⁷ receiving stolen property,⁵⁸ encouraging desertion by United States soldiers,⁵⁹ or for fighting as "guerilleros" in violation of the laws of war.⁶⁰

Faced with the task of administering occupied Mexican territory, General Scott relied on his authority as a commander to convene tribunals authorized only by customary international law. Despite the void of codified domestic authority, the law supported General Scott's exercise of command prerogative. In 1848, the United States Attorney General opined that United States courts had no jurisdiction over an Army officer who allegedly murdered a junior officer at Perote, Mexico.⁶¹

⁵⁶Statement of The Judge Advocate General of the Army, General Enoch H. Crowder, S. REP. No. 130, 64th Cong., 1st Sess., 40 (1916).

⁵⁷Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 63 n.317.

⁵⁸*Id.* at 63 n.318.

⁵⁹*Id.* at 65 n.325.

⁶⁰*Id.* at 65 n.326.

⁶¹Jurisdiction of the Federal Judiciary, 5 Op. Att'y Gen. 55 (1848). During the war with Mexico Captain Foster, of the Georgia battalion of infantry allegedly murdered a Lieutenant Goff, of the Pennsylvania volunteers. General Scott convened a military commission organized and constituted on the charge of homicide. Captain Foster escaped several days into the trial. The Attorney General concluded that the United States had no

General Scott convened a military commission to try the case, but the accused escaped and fled to Georgia. While acknowledging the validity of military commissions "established under the law of nations by the rights of war," the opinion concluded that the jurisdiction of the commission ended "by the restoration of the Mexican authorities."⁶² The Supreme Court

common law of crimes. Even today, the United States criminal code has no automatic extraterritorial application unless Congress explicitly regulates conduct overseas.

⁶²*Id.* at 58. This is the first legal basis for limiting the authority of military tribunals to occupation after armed conflict. The importance of this early opinion lies in the termination of the authority of the temporary military government at the time the military government ended. The opinion concluded that the rules and articles for the government of the Army no longer conveyed jurisdiction once the Army had been disbanded and been mustered out of the service.

For the purposes of modifying the UCMJ to have more utility during operations other than war, this early opinion is enlightening because the Attorney General recognized that "Congress can easily provide against a recurrence of the difficulties of the present case." *Id.* Congress has never provided a jurisdictional basis in United States civilian or military courts for punishing violations of the laws of war committed by ex-servicemembers. See Jordan J. Paust, *After My Lai-The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971). The attorney general restated the same limitation in subsequent opinions. See, e.g., *Jurisdiction of Naval Courts-Martial over Persons Discharged from the Service*, 31 Op. Att'y Gen. 521 (1919) (opining that a person discharged from the Naval Service before proceedings are initiated against him cannot thereafter be brought to trial for those violations); *Army Officer-Jurisdiction-Civil Courts-Military Courts*, 24 Op. Att'y Gen. 570 (1903).

The Supreme Court later held that military jurisdiction ends when a servicemember is discharged, but noted that Congress could create such jurisdiction. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21 (1955) (holding by a six to

later reaffirmed the commander's authority to punish civilians using military commissions in occupied territory.⁶³

The Civil War solidified the legal basis for commanders to punish civilians via military commissions, and defined the limits of that authority. Statutory authority recognized military commissions in 1863. Their jurisdiction eventually expanded to include guerillas, inspectors, civil officials working for the quartermaster department, and all persons under martial law.⁶⁴ In April 1863, Union Army General Orders No. 100 declared that the common law of war allowed military

three margin that the military cannot constitutionally convene a court-martial against an ex-servicemember suspected of murder and conspiracy to commit murder committed in Korea during the period of military service).

⁶³*Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177-78 (1857). *Accord Mechanics' & Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 295-97 (1874); *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132-33 (1869); *Cross v. Harrison*, 57 U.S. (16 How.) 164, 189-90.

⁶⁴See WINTHROP, *supra* note 47, at 833-34. Congress provided that murder, manslaughter, robbery, larceny, and other specified crimes when committed by military persons *in time of war or rebellion* should be punished by court-martial or military commission. The Act of March 30, 1863, § 30, 12 Stat. 731, 736 (1863) (emphasis added). The Confederate States also recognized the legality of military commissions. See An Act to organize Military Courts to attend the Army of the Confederate States in the Field and to define the Powers of Said Courts, reprinted in WINTHROP, *supra* note 47, at 1006 (providing that military courts of the Confederate States of America had jurisdiction over "all offences now cognizable by courts-martial ... and the customs of war").

commissions to prosecute "cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial."⁶⁵ Military commissions eventually tried and sentenced over 2000 cases during the war and the subsequent period of military government in the South.⁶⁶

Cases in the aftermath of the Civil War recognized the jurisdiction of military commissions.⁶⁷ More importantly for the proposals advocated in this thesis, the courts limited the jurisdiction to areas occupied by United States forces and

⁶⁵General Order No. 100, Instructions for the Government of the Armies of the United States in the Field, Apr. 24, 1863, 13, *reprinted in* THE LAWS OF ARMED CONFLICT 3 (Dietrich Schindler & Jiri Toman eds., 1988).

⁶⁶WINTHROP, *supra* note 47, at 834.

⁶⁷*See, e.g.,* Coleman v. Tennessee, 97 U.S. 509. (1878). Despite the jurisdictional sufficiency of military commissions, many proceedings were disapproved due to procedural irregularities. *See, e.g.,* Opinion of Judge Advocate General Joseph Holt to President Abraham Lincoln (Sept. 26, 1862), in Letters Sent-JAG, NARG 153 (Entry 1) (sentence disapproved because judge advocate not sworn); Opinion of Judge Advocate General Joseph Holt to Maj. Gen. Benjamin Butler (Nov. 4, 1862), in *id.* (sentence disapproved because records forwarded to Judge Advocate General were merely copies of original records); Opinion of Judge Advocate General Joseph Holt to Maj. Gen. Benjamin Butler (Dec. 16, 1862), in *id.* (sentence disapproved because record did not show sufficient procedural protections for the accused); Gen. Order No. 255, Aug. 1, 1863, in *id.* (death sentence disapproved because record did not show that the order convening the commission was read to the prisoner, and the prisoner did not have opportunity to challenge members, and members not sworn).

governed by martial law,⁶⁸ or to genuine violations of the law of war.⁶⁹ In 1866, for example, the Supreme Court granted a writ of *habeas corpus* filed by a citizen of Indiana who had been convicted by a military commission of "inciting insurrection" among other charges."⁷⁰ The Court recognized the authority of military commissions under the "laws and usages of war," but held that a commission had no jurisdiction in Indiana

⁶⁸WINTHROP, *supra* note 47, at 834 (describing the Reconstruction Act of March 2, 1867 which established military commissions in the occupied lands of the South); The Reconstruction Acts, 12 Op. Att'y Gen. 141 (1867) (discussing the interpretation of sections of the Reconstruction Act).

⁶⁹In 1865, a military commission convicted Captain Henry Wirtz, who was the commandant of the prisoner of war camp at Andersonville, Georgia. Captain Wirtz commanded one of the most notorious prisoner of war camps operated by either side during the Civil War. The commission sentenced him to die for murder and conspiring to maltreat federal prisoners of war while he served as the commandant of the prison at Andersonville, Georgia. See *Trial of Henry Wirtz*, in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 783-98 (Leon Friedman ed., 1971); Lewis L. Laska & James M. Smith, *Hell and the Devil: Andersonville and the Trial of Captain Henry M. Wirtz, CSA, 1865*, 68 MIL. L. REV. 77 (1975).

⁷⁰*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). On October 21, 1864, Lamdin P. Milligan faced trial by a military commission convened in Indianapolis, Indiana by order of Brevet Major-General Hovey, the commander of the military district of Indiana. The charges were preferred by a Major of the Judge Advocate General's Corps, and consisted of numerous specifications grouped under the charges "Conspiracy against the Government of the United States," "Affording aid and comfort to rebels against the authority of the United States", "Inciting insurrection", "Disloyal practices", and "Violation of the Laws of War." The military commission convicted him of all offenses and sentenced him to suffer death by hanging on Friday, May 19, 1865. *Id.*

because "the Federal government was always unopposed, and its courts always open to hear criminal accusations and grievances."⁷¹

⁷¹*Id.* at 121. The authorities were greatly afraid of an organization known as the Sons of Liberty. The Judge Advocate General released a report which described the Sons of Liberty as an organized, powerful group of conspirators who had been hired by Confederate officials to destroy the North. The Judge Advocate General demonized the group by saying that "Judea produced but one Judas Iscariot, but there has arisen together in our land an entire brood of such traitors ... all struggling with the same reckless malignancy for the dismemberment of our Union." JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 782 (1988). In the case of one of Milligan's co-conspirators, the "Supreme Grand Commander of the Sons of Liberty," the Supreme Court held that neither the Constitution nor federal statutes granted a right to certiorari for review of military commissions. *Ex parte Vallandigham*, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (No. 16,816), *cert. denied*, 68 U.S. (1 Wall.) 243 (1863). But see 12 Op. Att'y Gen. 332 (1867) (opining that a prisoner arrested with a view towards trial by military commission for violating his parole could have sought a writ of habeas corpus from the Supreme Court if the district court had not released him prior to trial). Unlike his compatriot, Milligan sought review of the denial of the writ of habeas corpus by the commission, and the Supreme Court restated the limitations of otherwise valid military commission jurisdiction

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection ... Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration.

Ex Parte Milligan, 71 U.S. at 127.

In apparent contrast, the Attorney General opined that a military commission had jurisdiction to convict the co-conspirators charged with assassinating President Lincoln.⁷² However, the opinion revolved around the Attorney General's assessment that the conspirators were "public enemies" who violated the laws of war rather than civilian criminals in a time of peace.⁷³ Focusing on the wartime context, the opinion

The Justices unanimously recognized the legality of military commissions, but three Justices dissented on the grounds that the lead opinion seemed to imply limits to Congress' authority to impose martial law. The Chief Justice wrote "[w]here peace exists, the law of peace must prevail. What we do maintain is, that when the nation is involved in war ... it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals...." *Id.* at 140.

⁷²Military Commissions, 11 Op. Att'y Gen. 297 (1865) (1865 U.S. AG LEXIS *36).

⁷³Chomsky, *supra* note 57, at 67. On April 14, 1865, John Wilkes Booth murdered President Lincoln. In a coordinated assault, another conspirator named Lewis Powell had stabbed and seriously wounded the Secretary of State, William Seward. Another conspirator was too afraid to shoot the Vice President, Andrew Johnson. After mortally wounding the President, Booth leaped to the stage, broke his leg, and escaped into the alley behind Ford's theater. On April 26, 1865, Union cavalry trapped John Wilkes Booth in a Virginia tobacco barn. Another accomplice, David Herrold surrendered, but Booth resisted. The troopers set fire to the barn in an effort to force Booth to surrender. A trooper shot Booth in the back of the head, and he died whispering "[t]ell my mother I died for my country... I did what I thought was best." GEOFFREY C. WARD ET AL., *THE CIVIL WAR* 383-393 (1990).

disregarded the fact that the Washington, D.C. civil courts were functioning because "[t]he civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle."⁷⁴

Thus, legal developments grounded the jurisdiction of military tribunals firmly in the bedrock of the commander's necessary right to wage war. By extension, military courts have jurisdiction insofar as they enforce the law in territory occupied pursuant to the conduct of war. These are not arcane concepts. Warmaking authority provides the linchpin to understanding the consistent case law regarding the jurisdiction of military commissions over both civilians and enemy forces who violate the laws of war.

For example, after the surprise attack on Pearl Harbor, General Order Number 4 established the jurisdiction of a military commission under martial law in Hawaii.⁷⁵ Based on the wartime nature of the offense, a military commission convicted Bernard Kuehn on February 21, 1942, for conspiring with Japanese officials to betray the United States fleet four

⁷⁴Military Commissions, 11 Op. Att'y Gen. 297 (1865) (1865 U.S. AG LEXIS *30).

⁷⁵Green, *supra* note 55, at 833.

days before the attack of December 7, 1941.⁷⁶ Even though the offenses occurred prior to the actual onset of hostilities, the conspirators violated the laws of war, and therefore were accountable to the military commission. In 1950, the Supreme Court noted that "the jurisdiction of military authorities, during and following hostilities, to punish those guilty of offenses against the laws of war is long-established."⁷⁷ The

⁷⁶*Id.* at 848. See also JAMES W. GARNER, II INTERNATIONAL LAW AND THE WORLD WAR 478-82 (1946) (describing the fact that offenses against the law of war may be tried by military commission even though committed before the actual declaration of martial law or the formal declaration of war).

⁷⁷*Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (quoting *Duncan v. Kahanamoku*, 327 U.S. 304 (1945) and denying habeas corpus to Germans convicted in China by an American military commission for war crimes committed after the German surrender and prior to the Japanese surrender). Accord *Devlin's Case*, 12 Op. Att'y Gen. 128 (1867) (opining that a military commission sitting in Washington had no jurisdiction to try a citizen of the United States, not in the military service, for an ordinary crime committed in New York). This holding should not be confused with other cases which limit the jurisdiction of military tribunals over American civilians. As the text points out, applying the proper authority under the law of war is the key to clearly understanding the delineations of military jurisdiction. Accordingly, the holding in *Reid v. Covert*, 354 U.S. 1 (1957), is not surprising. 10 U.S.C. § 802 extends courts-martial jurisdiction to "persons accompanying the force." UCMJ, art. 2(a)(11) (1988). In *Reid v. Covert*, the Court ruled that military jurisdiction could not be constitutionally applied to military dependents in time of peace. 354 U.S. at 35. See also *Kinsella v. Singleton*, 361 U.S. 234 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960). The Supreme Court has never squarely faced the issue whether a commander would presently have jurisdiction over American civilians who violate the law of war in the vicinity of United States forces. A literal reading of Articles 18 and 21 of the Uniform Code of Military Justice would appear to give the commander the option

Supreme Court has also held that military commissions in occupied Germany could exercise jurisdiction over United States citizens as well as foreign civilians.⁷⁸

The Supreme Court has repeatedly recognized the "power of the military to exercise jurisdiction over...enemy belligerents, prisoners of war, or others charged with violating the laws of war."⁷⁹ In *Ex Parte Quirin*, the Court sustained the jurisdiction of a military commission which convicted German saboteurs who landed in the United States to commit acts of war.⁸⁰ The soldiers violated the law of war by burying their German Marine Infantry uniforms immediately upon landing. The soldiers thereby became "unlawful combatants ...

of punishing those offenses in the forum of his choice, provided that the trial protected the American's constitutional rights as required by *Reid v. Covert* and *Toth v. Quarles*.

⁷⁸*Madsen v. Kinsella*, 343 U.S. 341 (1952). See also *United States v. Schultz*, 4 C.M.R. 104, 114 (C.M.A. 1952) (holding that the law of war gives an occupying force both the power and duty to enforce law in occupied territory, and consequently affirming the conviction of an American citizen for negligent homicide committed in occupied Japan); *Rose v. McNamara*, 375 F.2d 924 (D.C. Cir. 1966), cert. denied 389 U.S. 856 (1967) (upholding a tax evasion conviction by a military court in occupied Okinawa); 2 L. OPPENHEIM, INTERNATIONAL LAW 336-49 (H. Lauterpacht ed. 8th ed., 1969) (discussing the rights and duties of an occupying force).

⁷⁹*Duncan v. Kahanamoku*, 327 U.S. 304, 312 (1945).

⁸⁰317 U.S. 1 (1942). See also FM 27-10, *supra* note 4, para. 74 (stating that soldiers lose their right to treatment as prisoners of war when they remove their uniforms to fight in civilian clothes).

subject to trial and punishment by military commission for acts which render their belligerency unlawful."⁸¹ Using the same constitutional analysis, the Supreme Court sustained the jurisdiction of either courts-martial or military commissions to punish General Tomoyuki Yamashita for 123 separate atrocities committed by soldiers under his command in the Philippines.⁸²

Therefore, the entire scope of history and American jurisprudence compel the conclusion that Article 21 grants jurisdiction only over violations of the international laws of war. The text leads to the same conclusion, and even a well intentioned contrary view would confuse parties attempting to define their rights and duties under international law. As the Attorney General wrote in 1865, "Congress has power to define,

⁸¹*Id.* at 48. Seven of the eight soldiers were born in Germany, while one was a United States citizen. All eight lived in the United States, and returned to Germany between 1933 and 1941. *Id.* at 20. After the declaration of war between Germany and the United States, the Germans trained them in the use of explosives and other sabotage techniques. Four soldiers landed at Amagansett Beach, New York on June 13, 1942, and the other four landed at Ponte Vedra Beach, Florida four days later. The four in New York buried their uniforms, fuses, incendiary devices, and timing mechanisms, and went to New York City in civilian clothes. The four in Florida did likewise, but went to Jacksonville, Florida. The Federal Bureau of Investigation eventually captured all eight either in New York or Chicago.

⁸²*In re Yamashita*, 327 U.S. at 66.

not to make the laws of nations."⁸³ Accordingly, in military operations where the codified laws of war are not in force, Article 21 does not convey jurisdiction *in its present form*.

B. Jurisdiction of Courts-Martial

Article 18 of the UCMJ conveys general court-martial jurisdiction over "any person who by the law of war is subject to trial by a military tribunal," and allows "any punishment permitted by the law of war."⁸⁴ Congress added explicit court-martial jurisdiction over persons who violate the law of war in the 1916 revision to the Articles of War.⁸⁵ The language of

⁸³Military Commissions, 11 Op. Att'y Gen. 297 (1865) (1865 U.S. AG LEXIS *2).

⁸⁴10 U.S.C. § 818 (1995). Implementing this statutory authority, Rule for Court Martial 1003(b)(12) provides that "[i]n cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war." See MCM, *supra* note 44, R.C.M. 1003(b)(12); Civilians Convention, *supra* note 4, art. 68 (providing some limits to the discretion of military tribunals to adjudge punishments under the law of war). Rule for Court Martial 201 recognizes the dual jurisdictional grounds over violations of the law of war as well as offenses in violation of civil statutes when an occupying force declares martial law. See also Civilians Convention, *supra* note 4, arts. 4, 64, 66 (outlining the basis for declaring martial law and enforcing civil laws as an occupying power).

⁸⁵Article 2 of the Articles of War defined the class of "persons subject to military law." 39 Stat. 787, art. 2 (1916). In its 1916 form, Article 2 included some persons who, by the law of war, were prior to 1916 triable under the common law of war at military commissions. The 1916 version of Article 2 conveyed court-martial jurisdiction over "all retainers to the

Article 18 mirrors that of Article 21, and the operational jurisdiction of general courts-martial is similarly restricted.

Although Congress has constitutional authority to punish violations of international law,⁸⁶ exercising that prerogative does not change their character as offenses against international law. Congress simply has discretion to specify a domestic forum to try a case originating under and defined by international law. For example, early in United States history, courts-martial tried Captain Nathan Hale⁸⁷ and Major Andre⁸⁸ for spying. In 1780, Congress passed a resolution calling for a special court-martial against Joshua Hett Smith on the charge of complicity with Benedict Arnold's treason.⁸⁹

Article 21 states that military commissions and general courts-martial enjoy concurrent jurisdiction over persons who violate the laws of war. Accordingly, the commander cannot convene a general court-martial to try a person who has not violated the "law of war."⁹⁰ In spite of the fact that United

camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States." *Id.*

⁸⁶See *supra* note 38 and accompanying text.

⁸⁷Green, *supra* note 55, at 832.

⁸⁸*Id.* at 833.

⁸⁹*Id.*

⁹⁰By analogy, Article 2(a)(10) of the UCMJ allows jurisdiction over persons serving with or accompanying the force in the

States policy requires American soldiers to obey the laws of

field "in time of war." 10 U.S.C. § 802 (1995). Rule for Court-Martial 103(19) defines "Time of War" as a period declared by Congress or supported by the factual determination by the President that the existence of hostilities warrants a finding that a time of war exists for purposes of the manual. MCM, *supra* note 44, R.C.M. 103(19). "Time of War" affects six punitive articles of the UCMJ. See UCMJ, arts. 101, 105, 106 (which define offenses that can occur only in time of war) 85, 90, 113 (which are capital offenses in time of war). The legislative history of the UCMJ indicates that Congress considered "Time of War" to mean "a formal state of war." *Hearings on H.R. 2498 Before a Subcomm. of the House of Comm. on Armed Services*, 81st Cong., 1st Sess. 1228-1229 (1949). The United States Court of Military Appeals (recently redesignated as the Court of Appeals for the Armed Forces) examined the following circumstances among other to determine whether a time of war exists: the nature of the conflict, i.e. "armed hostilities against an organized enemy" *United States v. Shell*, 23 C.M.R. 110, 114 (C.M.A. 1957); the movement to and numbers of United States forces in the area; the casualties involved and the sacrifices required; the number of active duty personnel; legislation by Congress recognizing or providing for the hostilities; the amount of expenditures in the war effort. See *United States v. Bancroft*, 11 C.M.R. 5 (C.M.A. 1957); *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968); Carnahan, *The Law of War in the United States Court of Military Appeals*, 22 A.F. L. REV. 120 (1980-1981).

The Fiscal Year 1996 Department of Defense Authorization Act requires the Secretary of Defense and the Attorney General to appoint an advisory panel to review and make recommendations on jurisdiction over civilians accompanying the force. The panel must review historical experiences and current practices concerning the employment, training, discipline, and functions of civilians accompanying armed forces in the field. The panel must make recommendations regarding court-martial jurisdiction over civilians accompanying armed forces in the field during time of armed conflict not involving a declared war by Congress, to include revisions to existing Article III courts, or the establishment of Article I courts to exercise jurisdiction over such persons. National Defense Authorization Act For Fiscal Year 1996, Pub. L. No. 104-106, § 1151, 110 Stat. 186 (Feb. 10, 1996).

war during all deployments, the United States conducts many military operations which are not governed by the codified laws of war. Part III will describe the ways in which expanded jurisdiction over violations of humanitarian law by foreign national could assist operational commanders.

III. Jurisdiction as a Force Multiplier

The Cold War created a culture of intense, but disciplined international tension.⁹¹ Nations recognized that decisions to use force carried grave consequences, and made conscious decisions regarding escalation within conflicts.⁹² In spite of external political constraints, over forty million people lost their lives during over one hundred conflicts since the end of

⁹¹Edward N. Luttwak, *Toward Post-Heroic Warfare*, 74 FOREIGN AFF. 109, 110 (May-June 1995). Now that the Cold War no longer suppresses "hot wars," the entire culture of disciplined restraint in the use of force is in dissolution. Except for Iraq's wars, the consequences have chiefly been manifest within the territories that had been Soviet, as well as Yugoslav. The protracted warfare, catastrophic destruction, and profuse atrocities of eastern Moldavia, the three Caucasus republics, parts of Central Asia, and lately Chechnya, Croatia, and Bosnia have angered many Americans. Aggression and willful escalation remain unpunished. The victors on the battlefield remain in possession of their gains, while the defeated are abandoned to their own devices. It was not so during the Cold War, when most antagonists had a superpower patron with its own reasons to control them, victors had their guns whittled down by superpower compacts, and the defeated were often assisted by whichever superpower was not aligned with the victor. *Id.*

⁹²*Id.* at 111.

World War II.⁹³ Despite its authority on paper,⁹⁴ 279 Security Council vetoes prevented the United Nations from limiting most of those conflicts.⁹⁵ In the wake of the Cold War, the

⁹³This is the estimated worldwide total number of persons killed in the 125 wars since 1945. Ibrahim J. Gassama, *World Order in the Post Cold-War Era: The Relevance and Role of the United Nations After Fifty Years*, 20 BROOK. J. INT'L L. 255, 260 n.16 (1994).

⁹⁴Under the provisions for the peaceful settlement of disputes outlined in Chapter VI, the Security Council can "call upon" parties to pursue peaceful solutions or "recommend" such terms of settlement as it may consider appropriate. U.N. CHARTER, arts. 33-38. See generally GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 594-635 (6th ed. 1992). In contrast, Chapter VII gives the Security Council very broad latitude to respond to "threats to the peace, breaches of the peace, and acts of aggression." U.N. CHARTER, art. 39. The framers of the Charter "conferred upon the Security Council, in the provisions of Chapter VII, a very broad competence to make such determinations and to decide upon the steps necessary to bring about international peace and security." Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 6 (1968).

The Security Council does not have any power to compel states under Chapter VI. The framers rejected a clause which would have allowed the Security Council to impose a solution on parties where a failure to reach a settlement could be interpreted as a threat to the peace. LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS* 257-59 (1969). The framers also rejected a provision which would have explicitly linked Chapter VI actions with Chapter VII enforcement actions. *Id.* at 258.

⁹⁵The United Nations Secretary General estimated in an oft-quoted figure that over 100 conflicts left some 20 million dead. *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992*, U.N. GAOR, 47th Sess., Agenda Item 10, ¶ 8, U.N. Doc. A/47/277 S/24111 (1992) [hereinafter *Agenda for Peace*].

Secretary General promised that the "immense ideological barrier that for decades gave rise to distrust and hostility ... has collapsed."⁹⁶

President Bush spoke about a "New World Order" based on the triumph of American democratic values.⁹⁷ He pledged to "accept the responsibilities necessary for a vigorous and effective United Nations."⁹⁸ The United Nations appeared on the brink of realizing the drafter's intent⁹⁹ to maintain a safer, more peaceful world via collective security. The President of Russia declared that "[R]ussia will make use of the effective role of the United Nations and Security Council."¹⁰⁰

⁹⁶Id. ¶ 2.

⁹⁷George W. Bush, *Toward a New World Order*, 1 DEP'T OF STATE DISPATCH 491 (1990) (outlining American expectations of the new international framework before a joint session of Congress); Anthony Clark Arend, *Symposium: The United Nations and the New World Order*, 81 GEO. L.J. 491, 492-93 (1993).

⁹⁸*Summit at the U.N.*, N.Y. TIMES, Feb. 1, 1992, at A5; Frank J. Murray, *Bush Offers U.N. Army Everything But Troops*, WASH. TIMES, Sept. 22, 1992, at A3.

⁹⁹See Secretary of State, *Report to the President on the Results of the San Francisco Conference 87*, 79th Cong., 1st Sess. (Comm. Print 1945).

¹⁰⁰Julianne Peck, Note, *The U.N. and the Laws of War: How Can the World's Peacekeepers be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283, 288-89 (1995).

As the Cold War ended, however, latent conflicts around the world exploded. States fragmented into zones of hostility which resembled the anarchy of the pre-nation state system.¹⁰¹ Ethnic rivalries simmered into open conflict without any restrictions of law or propriety.¹⁰² One scholar noted that "[i]f there is a single power the West underestimates, it is

¹⁰¹*Ethnic Conflict*, supra note 5, at 31. The example of Chechnya, like Bosnia, is only one of many pointing to a regression in the conduct of war to some more bloody ruthless era. Professor Martin van Creveld of the Hebrew University in Jerusalem remarked that this is "a world of small statelets, of warlords with shifting loyalties and wars without major setpiece clashes. The people fighting them are not just soldiers either, but civilians too. That is why there is no distinction between combatants and noncombatants." Marcus Warren, *International Peace and Goodwill: Almost*, THE SUN. TELEGRAPH LTD., Dec. 24, 1995, at 14.

¹⁰²In May 1993, President Clinton began to doubt the policy of using airstrikes to assist the Muslim-led Bosnian government. He read a book called "Balkan Ghosts" by Robert D. Kaplan which suggested that the ethnic hatreds in the Balkans were so deeply rooted that there is little America could do about them. Michael Dobbs, *Bosnia Crystallizes U.S. Post-Cold War Role; As Two Administrations Wavered, the Need for U.S. Leadership Became Clear*, WASH. POST, Dec. 3, 1995, at A1. Aside from Bosnia-Herzegovina, the following nations suffer from ethnic strife: Spain, Britain, Germany, Romania, Russia, Moldova, Georgia, Azerbaijan, Turkey, Iraq, Israel, Algeria, Egypt, Sudan, Mauritania, Mali, Chad, Somalia, Senegal, Liberia, Togo, Nigeria, Uganda, Rwanda, Burundi, Kenya, Zaire, Angola, South Africa, Tajikistan, Afghanistan, Pakistan, India, Bhutan, Sri Lanka, Bangladesh, Myanmar, The People's Republic of China, Cambodia, Indonesia, Papua New Guinea, Fiji, Guatemala, Colombia, Peru, and Brazil. Lawrence I. Rothstein, Note, *Protecting the New World Order: Is It Time to Create a United Nations Army?*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 107, 112 n.35 (1993).

the power of collective hatred."¹⁰³ Inequitable distributions of wealth compounded ethnic tensions to create humanitarian disasters which required military responses in Somalia¹⁰⁴ and Rwanda.¹⁰⁵ Criminal organizations also penetrated formal

¹⁰³Ralph Peters, *The Culture of Future Conflict*, PARAMETERS 18, 25 (Winter 1995-96).

¹⁰⁴S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 63, U.N. Doc. S/RES/794 (1992) [hereinafter S.C. Res. 794]. See also Mort Rosenblum, *Somalia Famine Avoidable, Aid Workers Say*, L.A. TIMES, Oct. 4, 1992, at A16; Elizabeth Kurylo, *Aid Mission to Somalia Marks "New Chapter" U.N. Chief Says*, ATLANTA J. & CONST., Dec. 5, 1992, at A9. In a symptom of the current problems facing policy makers, some commentators suggest that the United States responded only after seeing images of starving Somali children on television sets. See, e.g., *Don't Forsake Somalia*, N.Y. TIMES, Nov. 4, 1992, at A30.

¹⁰⁵S.C. Res. 846, U.N. SCOR, 48th Sess., 3244th mtg., U.N. Doc. S/RES/846 (1993) (establishing United Nations Observer Mission Uganda-Rwanda (UNOMUR)); S.C. Res. 955, U.N. SCOR, 49th Sess. 3453d mtg., U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994) (establishing an international tribunal for the prosecution of war crimes committed in Rwanda, and adopting the Statute of the Tribunal which is attached as an Annex to the Security Council Resolution) [hereinafter Rwanda Statute]. See also Robert M. Press, *Surviving Tutsis Tell the Story of Massacres by Hutu Militias*, THE CHRIST. SCI. MON., Aug. 1, 1994, at 9. At the time of this writing, the ethnic tensions between the Hutus and Tutsis in Rwanda are still causing tremendous human suffering and tragedy. Donatelli Lorch, *At Edgy Border, Rwanda Army Kills 100 Hutu*, N.Y. TIMES INT'L, Sept. 14, 1995, at A14. The clashes between Tutsis and Hutus are currently threatening the stability of Burundi. *Letter Dated 3 January 1996 from the Secretary General Addressed to the President of the Security Council*, U.N. Doc. S/1996/8 (Jan. 5, 1996) (reporting the results of the Presidential Commission in Burundi which reported among other findings that "the ethnic polarization in the country is intensifying").

governmental structures to promote lawlessness.¹⁰⁶ The combination of these trends and others¹⁰⁷ transformed international politics and confronted United States policymakers with complex security challenges.

The rapid expansion of the United Nations role in world affairs was the most immediate result of the collapse of Communism. During its first thirty years, the United Nations launched thirteen peacekeeping operations.¹⁰⁸ During the Cold War, United Nations peacekeeping required the consent of the parties, financing by each member state, and minimal use of

¹⁰⁶Peters, *supra* note 103, at 21.

¹⁰⁷Cyclical trends at work since the end of the Cold War include the violence that accompanies the failure of empires and states, economic scarcity, environmental degradation, epidemics, mass migrations caused by war and famine, and ethnic cleansing. Historically unique trends contributing to the security challenges include global transportation, real-time media images with worldwide coverage, communications technology, proliferation of military technology, pollution, industrialization, and the potential scope of environmental damage caused by population growth. These trends are capable of producing synergistic effects that fast forward systematic collapse in the Third World. Stoft & Guertner, *supra* note 5, at 31.

¹⁰⁸Thomas G. Weiss, *New Challenges for UN Military Operation: Implementing an Agenda for Peace*, WASH. Q. 53 (Winter 1993). See *Reform of United Nations Peacekeeping Operations*, S. RPT. No. 43, 103d. Cong., 1st Sess., at vii (1993) (also noting the skyrocketing cost of United Nations operations from \$364 million in 1988 to nearly \$4 billion in 1995).

force.¹⁰⁹ Since 1988, the United Nations established thirteen new operations, while continuing most of the old operations.¹¹⁰ At the same time, United Nations operations became much more complex due to such factors as the increase in refugees, the paralysis of governing institutions, and the intertwined efforts of humanitarian agencies.¹¹¹ As a result, United Nations forces operate in chaotic and lawless environments against militias and armed civilians who have little or no discipline and fluid chains of command.¹¹²

The changes in the world dramatically affected the United States military. On the one hand, President Clinton declared

¹⁰⁹Agenda for Peace, *supra* note 95, ¶ 20. Peacekeeping is a U.N. invention. It was not specifically defined in the charter but evolved as a noncoercive instrument of conflict control at a time when Cold War constraints prevented the Security Council from taking the more forceful steps permitted by the charter. Boutros-Boutros Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89 (Winter 1992-93).

¹¹⁰*Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, U.N. GAOR, 50th Sess., U.N. Doc. A/50/60 S/1995/1, ¶ 11 (1995) [hereinafter *Agenda for Peace II*].

¹¹¹*Id.* ¶¶ 12, 13, 18, 20.

¹¹²*Id.* ¶ 13. United States forces involved in peace operations may not encounter large, professional armies or even organized groups responding to a chain of command. Instead, they will likely have to deal with "loosely organized groups of irregulars, terrorists, or other conflicting segments of a population as predominant forces. These elements will attempt to capitalize on perceptions of disenfranchisement or disaffection within the population. Criminal syndicates may also be involved." FM 100-23, *supra* note 16, at v.

that "[i]f the United States does not lead, the job will not be done."¹¹³ United Nations operations became an integral part of United States security policy.¹¹⁴ Despite rising operational requirements, Congress decreased defense spending to reap a promised "peace dividend."¹¹⁵ By 1994, the United States spent less on defense spending as a percent of gross domestic product than at any time since 1941.¹¹⁶ American forces declined from nearly 2.2 million personnel in 1990 to 1.5 million by 1995.¹¹⁷

However, in accordance with United States policy interests, United States forces deployed more often on a wider

¹¹³John F. Harris, *Clinton Likely to Stress Faith in U.N.; Some Say Foreign Policy Realities Have Tempered President's Idealism*, WASH. POST, Oct. 22, 1995, at A25.

¹¹⁴See Madeline K. Albright, Statement Before the Senate Foreign Relations Committee (Oct. 20, 1993), in 4 DEP'T OF STATE DISPATCH 789, 792 (Nov. 15, 1993); William J. Perry, *Military Assistance*, 17 DISAM J. 50, 51 (Summer 1995) ("Multilateral peacekeeping is an essential element of U.S. strategy for promoting peace abroad. It allows the United States to share its security responsibilities and burdens with others. The number of situations requiring peacekeeping operations has risen dramatically ... and can be expected to increase further in the years ahead.").

¹¹⁵Dobbs, *supra* note 102, at A1.

¹¹⁶H.R. REP. NO. 562, 103d Cong., 2d Sess., at 3 (1994) (showing a steady decline in funding beginning in 1986, to the point that 1995 defense appropriations represent only 3.8% of the gross domestic product). By contrast, the spending for the woefully unprepared, ill-equipped force prior to Korea remained at 5% of the gross domestic product in 1949. *Id.*

¹¹⁷*Id.*

variety of missions. During 1995, the Army had a daily average of 22,200 soldiers deployed to more than seventy countries.¹¹⁸ The increased tempo of deployments consumed larger chunks of the declining defense budget. The Department of Defense estimates that operations in Haiti cost nearly \$1.5 billion in unbudgeted expenses through the end of 1995.¹¹⁹ During the same

¹¹⁸General Dennis J. Reimer, *Where We've Been ... Where We're Headed: Maintaining a Solid Framework While Building for the Future*, in ASSOCIATION OF THE UNITED STATES ARMY, 1995-96 GREENBOOK 21, 23 (1995) (outlining the Army Chief of Staff's vision for the continued development of an Army "changing to meet the challenges of today ... tomorrow ... and the 21st century).

¹¹⁹*Implementation and Costs of U.S. Policy in Haiti: Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Comm. on For. Relations*, 104th Cong., 1st Sess. 25 (Mar. 9, 1995) (statement of Mr. John Deutch, Deputy Secretary of Defense). Mr. Deutch predicted that the funding shortfall would have "devastating results" if not corrected, and that "[o]ur forces will not be able to respond as quickly, endure as long or fight at the level of excellence to which our Nation is accustomed without the timely passing of the supplemental appropriations bill." *Id.* at 73.

By way of comparison, operations in Somalia cost the Department of Defense nearly \$885 million in unplanned expenditures. Peace Operations, Cost of DOD Operations in Somalia, March 1994, GAO/NSIAD-94-88, at 3 (Mar. 1994). Faced with the costs of sustaining operations in Bosnia, the Army decided to eliminate the Armored Gun System after spending more than \$260 million over 15 years in development expenses. As a result of cancelling the planned system, the 82nd Airborne will retain its 30 year old weapons systems until they can no longer function. As a result of operations in Bosnia, the only airborne division in the active United States Army will be forced to deploy on future operations with no deployable armored systems. Sean D. Naylor, *Army Trades Off AGS System for Cash/Kills Plan to Beef Up Quick Reaction Force to Pay Personnel Bills*, ARMY TIMES, Feb. 5, 1996; Pat Trowell, CONGRESSIONAL QUARTERLY INC., Jan. 4, 1996 (reporting plans for Department of Defense rescissions in the Fiscal Year 1996

period, the United States share of the world's gross domestic product declined to only twenty percent, about equal to the level in 1870.¹²⁰

United States policy objectives thus rely more on the use of military power even as that power shrinks. The model of an "expeditionary West" drives United States military deployments as policy makers apply limited resources to advance American interests abroad.¹²¹ In summary, American commanders must now

budget to pay for the Bosnia deployment, totalling around \$1.6 billion, and including \$150.4 million for the cancelled purchase of six F-16 jets, \$357.1 million Navy funds, and \$275 million Army funds to cancel modernization of 20 helicopters).

The Department of Defense has budgeted more than \$1 billion from Fiscal Year 1997 funds for peace operations currently ongoing in Bosnia and Southwest Asia. Secretary of Defense William J. Perry, DOD News Briefing, (Mar. 4, 1996) (available at <http://www.dtic.dla.mil/defenselink/news/Mar96/t030496-tper0304.html>) .

¹²⁰Michael Dobbs, *Who Won the War? For the Allies, the Price of Victory is Still Steep*, WASH. POST, May 7, 1995, at C1.

¹²¹Peters, *supra* note 103, at 25. After reviewing United States policy regarding peace operations, President Clinton signed Presidential Decision Directive 25 on May 3, 1994, *The Clinton Administration's Policy on Reforming Multilateral Peace Operations* (May 1994), reprinted in 33 I.L.M. 795 (1994) [hereinafter PDD-25]. See also United States Department of Defense Statement on Peacekeeping, reprinted in 33 I.L.M. 814 (1994) (discussing the focus of the new policy and in particular the desire to ensure that conflicts do not spread and to oppose violations of international and human rights law). PDD-25 outlined the template the President proposed to use prior to committing United States forces to multilateral peace operations. The directive proposed six areas of desirable reform for the United Nations. The "U.S. must be

accomplish more missions, with fewer funds, in more difficult operational settings, against less defined enemy forces, with shifting objectives, and fewer personnel.

During international armed conflicts, commanders have discretion to prosecute persons who commit war crimes. Coalition states, for example, could have prosecuted Saddam

able to fight and win wars, unilaterally whenever necessary." *Id.* PDD-25 commits United States forces to peace operations "to promote peace and stability" even in conflicts which do not "directly threaten American interests." *Id.* For the first time in American policy, PDD-25 also defined the scope of peace operations as encompassing "the entire spectrum of activities from traditional peacekeeping to peace enforcement aimed at defusing and resolving international conflicts." *Id.* The six proposals for reform are:

- (1) Making disciplined and coherent choices about which operations to support;
- (2) Reducing United States costs for United Nations peace operations;
- (3) Defining clearly our policy regarding the command and control of American military forces in United Nations operations;
- (4) Reforming and improving the United Nations' capability to manage peace operations;
- (5) Improving the way that the United States government manages and funds peace operations; and
- (6) Creating better forms of cooperation between the Executive, the Congress, and the American public on peace operations.

PDD-25 also describes a three-tiered set of criteria for weighing when the United States will vote to support peace operations, when American forces will participate in United Nations or other peace operations, and when American forces will participate in operations likely to involve combat.

Hussein for his war crimes.¹²² In contrast, commanders conducting peace operations¹²³ must balance a concern for human rights with a pragmatic concern for accomplishing the military mission. During peace operations, the military mission complements nearly simultaneous diplomatic, economic, informational, or humanitarian efforts.¹²⁴ In these operations, there are several ways in which prosecuting violations of international law in military courts could protect human rights while supporting the military mission.

¹²²Thomas R. Kleinberger, *The Iraqi Conflict: An Assessment of Possible War Crimes and the Call for Adoption of an International Criminal Code and Permanent International Tribunal*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 69 (1993); W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 DICK. J. INT'L L. 393 (1992); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988); DEP'T OF DEFENSE, UNITED STATES DEPARTMENT OF DEFENSE REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR-APPENDIX ON THE ROLE OF THE LAW OF WAR, *reprinted in* 31 I.L.M. 612 (1992).

¹²³The term "peace operations" is a comprehensive term that covers a wide range of activities. Peace operations create and sustain the conditions necessary for peace to flourish. Peace operations comprise three types of activities: support to diplomacy (peacemaking, peacebuilding, and preventive diplomacy); peacekeeping; and peace enforcement. Peace operations include traditional peacekeeping as well as peace enforcement activities, such as the protection of humanitarian assistance, establishment of order and stability, enforcement of sanctions, guarantee and denial of movement, establishment of protected zones, and forcible separation of belligerents. FM 100-23, *supra* note 16, at iv. See also THE JOINT CHIEFS OF STAFF, JOINT PUB 3-07.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACEKEEPING OPERATIONS (29 Apr. 1994).

¹²⁴FM 100-23, *supra* note 16, at 16.

In the first place, prosecution may directly serve to accomplish the mission. In response to the murders of Pakistani peacekeepers in Somalia, The United Nations Security Council passed Resolution 837 on June 6, 1993. The Resolution authorized United Nations forces to "take all necessary measures against all those responsible for the armed attacks ... including to secure the investigation of their actions and their arrest and detention for prosecution."¹²⁵

On August 30, 1993, United States forces began a campaign to capture the Somali warlord Mohammed Farrah Aidid.¹²⁶ A Pentagon spokeswoman explained that "[t]his is not a campaign to go after one man. It's an effort to improve the overall situation in Mogadishu."¹²⁷ Violent protests on Aidid's behalf hindered operations. On September 9, 1993, American gunships killed over 100 Somalis by firing into a crowd that was attacking American and Pakistani troops. After several more unsuccessful efforts to capture Aidid, United States Army

¹²⁵S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg., ¶ 5, U.N. Doc. S/RES/837 (1993) (expressing grave alarm at the premeditated attacks apparently directed by the United Somali Congress) [hereinafter S.C. Res. 837].

¹²⁶Patrick J. Sloyan, *Hunting Down Aidid; Why Clinton Changed His Mind*, *NEWSDAY*, Dec. 6, 1993, at A1. Unless otherwise noted, all information in this paragraph comes from this source.

¹²⁷*Id.*

Rangers captured Osman Ato, who was the warlord's chief financial backer.¹²⁸

Ato's arrest was "a significant milestone" because he was a "key individual in Aidid's militia."¹²⁹ In New York, the Secretary General responded, "[w]e must have the staying power to see the operation to its end. If the forces of chaos and corruption conclude that the United Nations is short of breath, they will prevail simply by waiting for the world to turn its attention elsewhere."¹³⁰ Pursuant to Resolution 837, United Nations forces took custody of Ato.¹³¹

In truth, the United Nations was unprepared to prosecute persons captured under the authority of Resolution 837.¹³²

¹²⁸Keith B. Richburg & Julia Preston, *U.S. Rangers Capture Somali Warlord's Aide: 3 U.N. Troops Killed*, WASH. POST, Sept. 22, 1993, at A25.

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹United Nations officials denied Ato the right to see an attorney by claiming that he had not been charged. United Nations spokesmen argued that Resolution 837 gave them the power to detain anyone for any period of time who was suspected of "militia activities" or of complicity in the June 5 ambush which killed 24 Pakistani peacekeepers. Keith B. Richburg, *Somalis' Imprisonment Poses Questions About U.N. Role*, WASH. POST, Nov. 7, 1993, at A45.

¹³²Interview with Major Charles Pede (Jan. 23, 1996). Major Pede served as the Chief of Justice deployed to Somalia with elements of the 10th Mountain Division.

Despite the bloodshed and sacrifice of many brave men,¹³³ the United Nations released Ato and all other Somalis after four months of confinement. As of this writing, battles between Ato and Farah Aidid are costing Somali lives and threatening to keep Somalia mired in political chaos for the foreseeable future.¹³⁴ Prosecution in an American military tribunal would have furthered the mission, saved both Somali and American lives, and helped to restore order to Somalia.

The arrest of Osman Ato was an unusual situation in which the defined mission included avenging crimes against international peacekeepers. The present situation of forces deployed on Operation Joint Endeavor in Bosnia-Herzegovina offers a haunting parallel. United States commanders have focused on the specific tasks required under the Dayton Accords, and declined to aggressively seek out indicted war criminals.¹³⁵ NATO forces will face tremendous pressure to

¹³³See *infra* note 3 and accompanying text.

¹³⁴Stephen Buckley, *Somalis Are Not Starving, Nor Are They Coalescing*, WASH. POST, Oct. 21, 1995, at A18.

¹³⁵Joint Endeavor Fact Sheet No. 004-B, (7 Dec. 1995) (detailing various aspects of the IFOR(Implementation Force) mission to "create a stable environment for the civil aspects to proceed." The IFOR mission is to protect the force by ensuring self-defense and freedom of movement, enforce required withdrawal of force to respective territories, establish and man a zone of separation, enforce the cessation of hostilities, and to provide a secure environment which permits conduct of civil peace implementation functions) (available at <http://www.dtic.dla.mil/bosnia/fs/bos-004.html>).

expand their mission to include the arrest of indicted war criminals and the investigation of other offenses.¹³⁶ To date, the Tribunal has not completed one trial in almost three years of existence.¹³⁷ The interests of justice, and the very stability of Bosnia, may compel American military courts to prosecute violations of humanitarian law in order to make the operational mission succeed.

Finally, the commander always bears an absolute responsibility for protecting his force. An overemphasis on firepower alone may be counterproductive. Winfield Scott's war courts conserved American manpower by producing an unprecedented degree of stability and order in Mexico.¹³⁸ United States forces deployed in a foreign environment must

¹³⁶Rick Atkinson, *U.S. Cautious on Opening Roads to Area of Reported Massacres*, WASH. POST, Jan. 3, 1996, at A17; David Rohde, *U.S. May Be Mired in Bosnia by Aiding War Crime Probes*, CHRIST. SCI. MON., Jan. 17, 1996, at 6; Christine Spolar, *NATO Album of Bosnia's Most-Wanted*, WASH. POST, Feb. 20, 1996, at A7 (describing the poster issued to help NATO's 60,000 troops identify and detain 51 indicted war criminals).

¹³⁷*Note by the Secretary General, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991*, 50th Sess., U.N. Doc. S/1995/728, ¶ 6 (containing the second annual report of the International Tribunal).

¹³⁸See *supra* notes 55-61 and accompanying text; K. JACK BAUER, *THE MEXICAN WAR 1846-1848*, at 327 (1974) (describing the birth of a movement for Mexican incorporation into the United States, or at least the assumption of control by Scott within the entire country).

constantly measure their efforts against the milestones that best indicate success.¹³⁹ Each operational decision should accordingly mirror the course of action which best achieves the desired endstate for the operation. On the other hand, allowing the criminals to seize the initiative endangers the stated objectives and may increase operational costs in blood and treasure.¹⁴⁰ Prosecutions of foreign nationals could help protect vulnerable forces by improving the political and cultural climate of the host nation.

The consent of the parties to peace operations is another fundamental variable which impacts on force protection and defines the nature of the operation.¹⁴¹ In peace operations, the commander must remain aware of the changing dynamics between opposing forces, politicians, and allied forces. Loss of consent may lead to an uncontrolled escalation of violence. Societal violence, in turn, endangers American Armed Forces and may threaten operational objectives. Prosecuting foreign nationals must be a considered policy decision because trials require the United States to abandon a pretense of absolute neutrality. Trials in military forums could improve the environment, but also could have adverse short term effects. The commander must consider the likely impacts of prosecution

¹³⁹KENNETH ALLARD, *SOMALIA OPERATIONS: LESSONS LEARNED* 32 (1995).

¹⁴⁰Chester A. Crocker, *The Lessons of Somalia: Not Everything Went Wrong*, 74 FOREIGN AFF. 2 (May-June 1995).

¹⁴¹FM 100-23, *supra* note 16, at 13.

in light of the overall political objective, and the cooperation required to achieve that objective. As a corollary, the commander should initiate prosecution of foreign nationals only after coordination with the civilian leadership responsible for the foreign policy of the United States.

In light of these factors, there will be some cases where the only rational military and humanitarian course is to prosecute the criminal. Criminals should not remain unpunished simply because they commit crimes during an operation other than war. As the United Nations learned in Somalia,¹⁴² Cambodia,¹⁴³ and most recently Bosnia, criminals will remain unpunished unless the mechanism for prosecution is ready. Section IV will examine the legal authorities which will allow Congress to amend the Uniform Code of Military Justice to allow commanders to prosecute continuum crimes.

¹⁴² See *infra* notes 125-34 and accompanying text.

¹⁴³ After the Cambodian government took little action on murders and numerous acts of political intimidation during October and November 1992, United Nations Transition Authority Cambodia (UNTAC), officials argued for the creation of a Special Prosecutor's Office. The special office was innovative, and the requirement had not been obvious during the planning phase of the mission. The United Nations formed the Special Prosecutor's Office ten months into the operation, and two full months after an internal UNTAC study verified that the government had taken absolutely no action against human rights offenders. According to one UNTAC official, the decision came too late to significantly improve the situation. U.N. Peacekeeping: Lessons Learned in Managing Recent Missions, GAO/NSIAD-94-9, at 54 (1993).

IV. The Legal Authorities for Expanded Jurisdiction

A. Multilateral Treaty Rights

1. *The Crime of Genocide*--Any state violates international law if it "encourages genocide or otherwise condones genocide."¹⁴⁴ Genocide is the paradigm for Hugo Grotius's maxim that a state cannot conduct "atrocities against its subjects which no just man can approve."¹⁴⁵ President Carter stated that organized murder conducted by the Ugandan government "disgusted the entire world."¹⁴⁶ Despite repeated

¹⁴⁴RESTATEMENT, *supra* note 12, § 702 cmt. d.

¹⁴⁵H. GROTIUS, 2 DE JURE BELLI EST PACIS 438 (Whewell transl. 1853). Judge Lauterpacht noted that "there are limits to [a state's] discretion and that when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of humanity, intervention in the interest of humanity is legally permissible." OPPENHEIM, *supra* note 78, § 137. Thomas Aquinas wrote that the first principle of natural law is do good and avoid evil. According to Aquinas, the very purpose of government is to foster "the unity and peace of the people." PAUL CHRISTOPHER, THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES 77 (1994).

¹⁴⁶During a news conference on February 23, 1977, President Carter expressed his "great concern" and stated that the British were considering a request to the United Nations to intervene in Uganda to stop the murders ordered by Idi Amin. 13 WEEKLY COMP. OF PRES. DOC. 244 (Feb. 28, 1977).

failures to enforce international norms,¹⁴⁷ the authority to prosecute genocide in domestic courts is one of the clearest examples of the class of offenses I term continuum crimes.

¹⁴⁷The legal literature on humanitarian intervention is far too extensive to completely list here. The recurring pattern of governments slaughtering their citizens has led many scholars to argue for a clear international rule allowing intervention in the otherwise sovereign affairs of other states based on gross, widespread violations of human rights by the government. See, e.g., Douglas Eisner, *Humanitarian Intervention in the Post-Cold War Era*, 11 B.U. INT'L L. J. 195 (1993); Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203 (1974); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed., 1973); MICHAEL WALZER, JUST AND UNJUST WARS 101-08 (1977); F. Teson, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185-214 (L. Damrosch & D. Sheffer eds., 1991); Richard B. Lillich, *Forcible Self-Help By States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967); B. De Schutter, *Humanitarian Intervention: A United Nations Task*, 3 CAL. W. INT'L L. REV. 21 (1972); Thomas M. Frank & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973); Thomas Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157 (1978); H. Scott Fairley, *State Actors, Humanitarian Intervention And International Law: Reopening Pandora's Box*, 10 GA. J. INT'L & COMP. L. 29 (1980); Michael J. Bayzler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547 (1987); Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321 (1989); R. George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 FLA. J. INT'L L. 435 (1989); David M. Kresock, Note, *"Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L. J. 203 (1994); Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force To Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120 (1992/1993).

The horrors of the Holocaust inspired the efforts to define¹⁴⁸ and prevent genocide. The Nazis murdered millions of innocent civilians.¹⁴⁹ The Nazis also targeted the Jewish race, as well as Gypsies, Jehovah's Witnesses, homosexuals, political enemies, and occupants of conquered territories.¹⁵⁰ By unanimously adopting Resolution 96(I), the United Nations General Assembly defined genocide as "the denial of the right to exist of entire groups."¹⁵¹ The resolution established genocide as an international crime and appealed to member states to enact appropriate criminal legislation. Two years later, on December 9, 1948, the General Assembly approved a draft of the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁵²

¹⁴⁸The term derives from the Greek words *genos* (meaning race) and *cide* (meaning killing). Dr. Raphael Lemkin introduced the phrase in response to Winston Churchill's comment that Nazi crimes in Poland did not have a name. John Webb, *Genocide Treaty-Ethnic Cleansing-Substantive and Procedural Hurdles in The Application of The Genocide Convention To Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377, 387 n.49 (1993).

¹⁴⁹Some estimates range as high as 8 million victims. OPPENHEIM, *supra* note 78, § 340p; 8 IMT, *supra* note 2, at 330 (340,000 victims were exterminated at Helmo, 781,000 at Treblinka); 22 IMT, *supra* note 2, at 496 (six million Jews were murdered by the Nazis, four million of which died in concentration camps).

¹⁵⁰Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 834 (1990).

¹⁵¹G.A. Res. 96(I), U.N. Doc. A/231 (1946).

¹⁵²*See infra* note 11.

Since its entry into force on January 12, 1951, the Genocide Convention is the clearest definition of the customary international crime of genocide.¹⁵³

The criminal nature of genocide remains constant, regardless of the context. The Genocide Convention imposes a duty on all signatories to prevent "genocide in time of peace or war."¹⁵⁴ Article 6(c) of the London Charter authorized the

¹⁵³President Truman transmitted the Convention to the Senate for its advice and consent on December 9, 1948. The Senate held hearings on the Convention in 1950. On February 19, 1986, the Senate gave its advice and consent to the Convention by a vote of 83 yeas to 11 nays with 6 absences. The Senate's consent is subject to two understandings, five reservations, and one declaration, 32 CONG. REC. 15, S1377-78. For a detailed analysis of each section of the Convention and the effect of the reservations and understanding on each section, see *Crime of Genocide: Hearing before Sen. Comm. on For. Rel. on the Prevention and Punishment of the Crime of Genocide*, 99th Cong., 1st Sess. (1985); *Senate Committee on Foreign Relations, Report of the International Convention for the Prevention and Punishment of the Crime of Genocide*, EXEC. RPT. No. 2, 99th Cong., 1st Sess. (1985), reprinted in 28 I.L.M. 760 (1989). As of this writing, 120 countries have ratified the Genocide Convention. DEP'T OF STATE, TREATIES IN FORCE 358-9 (1995). Of particular note, Yugoslavia was one of the first nations to ratify the instrument on August 29, 1950, reprinted in 28 I.L.M. 779 (1989).

¹⁵⁴Genocide Convention, *supra* note 11, art. 1. Pursuant to the obligation under article V of the Convention, President Reagan signed the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (Nov. 4, 1988), codified at 18 U.S.C. §§ 1091-93 (1995), reprinted in 28 I.L.M. 754 (1989) (restating the definitions and prohibitions of articles III and IV of the Convention). President Reagan commented that nations of the world came together and drafted the Genocide Convention as a howl of anguish and an effort to prevent and

International Military Tribunal to prosecute "murder, extermination, and other inhumane acts committed against any civilian population, before or during the war."¹⁵⁵ Extending the definition of Crimes Against Humanity, the Genocide Convention defined the crime of genocide to require "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group."¹⁵⁶ The treaty

punish future acts of genocide. 89 DEP'T OF STATE BULLETIN 38 (Jan. 1, 1989). The statutory implementation limits United States jurisdiction to offenses occurring within the United States or committed by a United States citizen, and specifically states that there is no statute of limitations for the Crime of Genocide.

¹⁵⁵London Charter, *supra* note 12, art. 6(c). The International Tribunal decided to restrict its examination only to acts listed in Article 6(c) which had taken place after the beginning of the war. Expanding the inquiry to acts prior to the war would have been an unprecedented recognition of fundamental human rights. Prosecuting human rights violations would have been an intervention in the territorial and political sovereignty of states which the Tribunal was unprepared to take. VON GLAHN *supra* note 94, at 885. As this thesis points out, the evolution on international law in the intervening fifty years has clarified the jurisdiction of international tribunals over criminal violations of human rights law. As used in this thesis, the term continuum crimes denotes law of war violations during international armed conflicts, as well as violations of international law which occur during internal armed conflicts or other types of peace operations. See *infra* notes 297 - 346 for the substantive scope of continuum crimes.

¹⁵⁶Genocide Convention, *supra* note 11, art 1.

applies to a broad class of acts¹⁵⁷ which are crimes regardless of the identity of the offender.¹⁵⁸

Despite the codified Convention, its textual limitations have allowed extensive genocidal campaigns throughout the world. Article II requires the specific intent to destroy the protected group, coupled with acts in furtherance of that intent. A single murder could theoretically constitute genocide if committed with the intent to eradicate the victim's

¹⁵⁷Article II of the Convention states: In the Present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group,
- (b) Causing serious bodily or mental harm to members of the group,
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,
- (d) Imposing measures intended to prevent births from within the group,
- (e) Forcibly transferring children of the group to another group.

Article III states that the following acts shall be punishable: Genocide, Conspiracy to commit Genocide, Direct and public incitement to commit genocide, Attempt to commit genocide, Complicity to genocide. Genocide Convention, *supra* note 11, arts. II, III.

¹⁵⁸Article IV of the Convention states that: Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals. *Id.*, art. IV.

protected group.¹⁵⁹ At the other extreme, states have committed mass killings of religious minorities¹⁶⁰ and in areas where they have territorial ambitions¹⁶¹ while denying any intent to destroy the group. States have also slaughtered innocent civilians as a form of retribution following armed conflicts, thereby slipping through the specific intent loophole.¹⁶² The drafters of the Convention rejected an amendment which would have applied the Convention if government action destroyed

¹⁵⁹M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 201, 251 (1979).

¹⁶⁰See Paul Starkman, *Genocide and International Law: Is There a Cause of Action?*, 8 ASILS INT'L L.J. 1 (1984) (describing the persecution of the Buddhist population of Tibet by The People's Republic of China in 1959 and 1969); David Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. Tol. L. REV. 253 n.4 (1992) (describing the Iraqi aggression against Kurdish and Shiite minorities which killed thousands and displaced millions of citizens, as well as summarizing a series of genocidal campaigns for a variety of reasons by governments all over the world).

¹⁶¹See Jean E. Zeiler, *The Applicability of the Genocide Convention to Government Imposed Famine in Eritrea*, 19 GA. J. INT'L & COMP. L. 5899 (1989) (describing a "deliberate, genocidal attempt" by the government of Ethiopia to starve the Eritrean people into submission, as well as efforts by the government of Paraguay to exterminate the Ache Indian population); *German Parliament Wants Serbs Branded for Genocide*, THE REUTERS LIB. REP. (July 2, 1992) (describing the difficulties implementing the Convention even in extreme cases such as that in Cambodia where the government murdered millions of its citizens).

¹⁶²John N. Moore, *The Use of Force in International Relations: Norms Concerning the Initiation of Coercion*, in JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 85-192, 162 (1990) (citing estimates that official genocide in Cambodia killed between one and two million citizens in a span of two years).

parts of a designated group without the specific intent to destroy the group.¹⁶³

From the victim's perspective, murder is murder, and the requirement for specific intent regarding the group as a whole is meaningless. However, even if the criminal intended to destroy the group, Article VI prevents enforcement of the criminal provisions of the Convention. Article VI states that "persons charged shall be tried by a competent tribunal of the State in the territory of which the act was committed."¹⁶⁴ Article VI leaves the foxes in charge of the henhouse, and no government has exercised its duties under the Convention to punish offenders of its own nationality who killed either individually or on its behalf. The specific intent requirement in conjunction with the domestic jurisdiction clause nullifies any practical application of the Convention. The Convention is rightly viewed as a "registration of protest against past

¹⁶³3 U.N. GAOR C.6, 73d mtg., at 12, U.N. Doc. A/C.6/SR 73 (1948).

¹⁶⁴Genocide Convention, *supra* note 11, art. VI. A literal reading of this provision would restrict a domestic court from applying its own law to one of its citizens who committed genocide outside its borders. The United States has an understanding that an American citizen who commits genocide abroad will be prosecuted in federal court under American law, and the United States Code implements that understanding. See 18 U.S.C. § 1091(d) (1995).

misdeeds or collective savagery rather than an effective instrument to prevent and punish genocide."¹⁶⁵

Nevertheless, the United States retains authority to punish genocide committed by foreign nationals because genocide is a crime under customary international law. The Convention does not describe a workable enforcement mechanism, but defines and prohibits the crime itself. The United Nations Committee of Experts reporting on the situation in Rwanda noted that the crime of genocide has achieved the status of *jus cogens*, and binds all members of the international community.¹⁶⁶ Genocide is therefore a universal jurisdiction crime punishable by any state, regardless of the nationality of the offender or the site of the atrocities.¹⁶⁷

Punishing genocide in United States military forums would help accomplish the overriding purpose of the Convention by

¹⁶⁵OPPENHEIM, *supra* note 78, § 340p.

¹⁶⁶*Letter dated 9 December 1994 From the Secretary General Addressed to the President of the Security Council*, U.N. Doc. S/1994/1405 (1994) (containing an Annex which prints the Final Report of the Commission of Experts Established Pursuant to Resolution 93) [hereinafter Rwanda Commission], and an Appendix which sets out a Statute for an international tribunal for Rwanda) (available at http://gopher.undp.org:70/00/uncurr/sgrep/94_12/1405). The Commission of Experts documented "overwhelming evidence of genocide," and specified that genocide has attained *jus cogens* status as an international crime. Rwanda Commission, *supra*, ¶ 152.

¹⁶⁷RESTATEMENT, *supra* note 12, § 404; Starkman, *supra* note 160, at 49.

helping prevent future acts.¹⁶⁸ In any event, Article I of the Genocide Convention arguably imposes a "prevent and punish" duty on the commander with regard to genocidal activities in the area of operations.¹⁶⁹ In some situations, protecting the right to life overseas will be an integral component of the mission. Other than simply detaining offenders without convictions, trials in military forums would be the only option within the commander's power. Enforcing the prohibition on genocide would comply with international law, and simultaneously advance the objectives of the mission.

2. *The Crime of Attacking United Nations Personnel*--The danger to United Nations employees and military forces supporting United Nations sanctioned operations is at an all time high. The threats to force security have increased in direct proportion to the rising complexity, pace, and scope of

¹⁶⁸See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, at 2563 n.105 (1991).

¹⁶⁹Article I imposes a duty to "prevent" genocide "in time of peace or war." Genocide Convention, *supra* note 11, art. 1. See also U.N. Charter arts. 55(c), 56 (obligation to respect and ensure respect for human rights); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 3, ¶ 52(A)(1) (Apr. 8, 1993) ("should immediately take all measures within its power to prevent commission of the crime of genocide"); G.A. Res. 3071, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973) ("shall cooperate with a view to halting and preventing crimes against humanity, and take the domestic and international remedies necessary for that purpose").

United Nations operations. The Security Council has authorized more operations since 1991 than in the previous forty-six years.¹⁷⁰

The Security Council also expanded its traditional peacekeeping role to assume new responsibilities such as monitoring elections,¹⁷¹ human rights investigations, war crimes prosecutions,¹⁷² police training,¹⁷³ civil administration,

¹⁷⁰*Background Notes: United Nations*, 6 DEP'T OF STATE DISPATCH 570, 572 (July 17, 1995) (listing the operations initiated since 1991 in the Mideast (UNIKOM), Africa (UNTAG and MINURSO), Cambodia (UNAMIC and UNTAC), the former Yugoslavia (UNPROFOR and IFOR), Chad (UNASOG), Mozambique (ONUMOZ), Rwanda (UNAMIR/UNOMUR), Somalia (UNOSOM II), El Salvador (ONUSAL), Liberia (UNOMIL), Georgia (UNOMIG), Haiti (UNMIH), Tajikistan (UNMOT), and Angola (UNAVEM)).

¹⁷¹Civilian police from twenty-five different countries deployed to Namibia in support in UNTAG, and 3,600 deployed to Cambodia in support of UNTAC. Based on these experiences, the United Nations deployed civilian police to support both UNPROFOR (Bosnia and Croatia) and UNOSOM (Somalia). *Reform of United States Peacekeeping Operations: A Mandate for Change*, S. RPT. No. 45, 103d Cong., 1st Sess., at 22-29 (1993).

¹⁷²See S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) (recommending an international tribunal to try crimes committed in the former Yugoslavia); UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993), U.N. Doc. S/25704 and Annex (May 3, 1993), reprinted in 32 I.L.M. 1159 (1993) (including a proposed statute for the International Tribunal for the Prosecution of War Crimes in the Former Yugoslavia) [hereinafter Report of the Secretary General will refer to the body of the report and Statute of the International Tribunal will refer to the annexed statute]; Rwanda Statute, *supra* note 105.

refugee protection, and establishing secure areas for the protection of civilians.¹⁷⁴ Implementing these goals, Security Council resolutions increasingly authorize member states to use "all necessary means" to restore order and separate warring factions.¹⁷⁵ These difficult missions in dangerous environments

¹⁷³S.C. Res. 997, U.N. SCOR, 50th Sess., 3542d mtg., U.N. Doc. S/RES/997 (1995) (adjusting the UNAMIR mandate). Congress implicitly recognized the need for increased United States efforts in this regard with a specific provision of the Foreign Operations, Export Financing, and Related Programs Appropriations Act for Fiscal Year 1996. Congress amended § 660(b) of the Foreign Assistance Act, to allow United States military forces to assist efforts to "reconstitute civilian police authority and capability in post-conflict restoration of host nation infrastructure for the purpose of supporting a nation emerging from instability." Foreign Operations, Export Financing, and Related Programs Appropriations Act, Fiscal Year 1996, Pub. L. No. 104-107, § 540A(d), 110 Stat. 704 (1996), to be codified at 22 U.S.C. § 2420.

¹⁷⁴S.C. Res. 918, U.N. SCOR, 49th Sess., 3377th mtg., U.N. Doc. S/RES/818 (1994), reprinted in 5 DEP'T OF STATE DISPATCH 352 (May 30, 1994) (expanding the UNOMIR mission to use all resources available to it to contribute to the security and protection of displaced persons, refugees, and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible of secure humanitarian areas); S.C. Res. 925, U.N. SCOR., 49th Sess., 3388th mtg., U.N. Doc. S/RES/925 (1994) (authorizing additional forces for UNAMIR and recognizing that those forces may need to use force in pursuit of Security Council objectives); S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993) ("all parties concerned treat Srebrenica and its surrounding areas as a safe area which should be free from armed attack or any other hostile act"). See also 30 U.N. CHRONICLE 12, Sept. 1993 (discussing S.C. Res. 824 which expanded "safe area" protections to Sarajevo, Tuzla, Gorazde, Zepa, and Bihac).

¹⁷⁵FM 100-5, *supra* note 16, at 3-7; S.C. Res. 929, U.N. SCOR, 49th Sess., 3392nd mtg., U.N. Doc. S/RES/929 (1994) (allowing

have caused a dramatic increase in casualties among United Nations contingents.¹⁷⁶

In response to the rising wave of violence towards United Nations personnel, the United Nations General Assembly adopted the Convention on the Safety of United Nations and Associated

"all necessary means" for UNAMIR to implement the goals of Security Council Resolution 925 in Rwanda); Res. 940, *supra* note 22 (authorizing "all necessary means" for the multinational force operating inside Haiti on Operation Uphold Democracy); S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc., S/RES/770 (1992) ("all measures necessary" to facilitate the delivery of humanitarian assistance to Bosnia-Herzegovina).

¹⁷⁶The Secretary-General of the United Nations observed that "[t]he number of fatalities among United Nations military contingents has also dramatically increased during the past two years [1992-1994]. While the grand total for all past and ongoing missions amounts to 1,074 fatalities, in 1993 alone 202 personnel were killed". *Note by the Secretary-General*, U.N. Doc. A/AC.242/1 (1994), *quoted in Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621, 622 n.3 (1995) [hereinafter *Protecting Peacekeepers*]. The dangers are not limited to military forces. In 1994, 65 United Nations civilians died worldwide, mostly in Rwanda. Peter Hansen, *Humanitarian Aid on an International Scope*, THE CHRIST. SCI. MON., Aug. 15, 1995, at A1. Since 1985, the International Committee of the Red Cross has had 48 employees killed and another 147 simply disappear. *Id.* At the time of this writing, attacks against United Nations agency staff and non-governmental agencies working inside Burundi have virtually halted humanitarian assistance in that country. *Letter dated 16 January 1996 From the Secretary-General to the President of The Security Council*, U.N. Doc. S/1996/36 (Jan. 17, 1996).

Personnel.¹⁷⁷ The Safety Convention covers all persons engaged or deployed by the Secretary-General as members of the military, police, or civilian components of a United Nations operation.¹⁷⁸ The Safety Convention also protects "associated persons" from member states or non-governmental agencies who deploy in support of United Nations objectives.¹⁷⁹ The United States signed the Convention on December 19, 1994.¹⁸⁰

¹⁷⁷Convention on the Protection of United Nations Persons and Associated Personnel, *opened for signature* Dec. 15, 1994, G.A. Res. 49/59, U.N. Doc. A/49/742 (Dec. 9, 1994), *reprinted in* 34 I.L.M. 482 (1995) [hereinafter Safety Convention].

¹⁷⁸*Protecting Peacekeepers*, *supra* note 176, at 623. This includes military forces supporting Security Council objectives, as well as civilian officials and experts on mission of the United Nations or one of its specialized agencies or the International Atomic Energy Agency (IAEA) who are present in an official capacity in the area of a United Nations operation. As an aside, this Convention may also be a tool for controlling nuclear terrorism by prosecuting persons who interfere with or threaten IAEA employees attempting to perform their monitoring and reporting duties.

¹⁷⁹This is an important category because it includes United States Armed Forces who are not under the control of the United Nations, but whose deployment authority arises from mandates of the Security Council exercising its Chapter VII enforcement powers. This would include NATO forces supporting UNPROFOR, and the current IFOR deployed on Operation Joint Endeavor in Bosnia, as well as the Multinational Force operating inside Haiti prior to the time that the United Nations assumed control of the situation with UNMIH, and United States assistance in Somalia under the UNITAF.

At the time of this writing, attacks against United Nations agency staff and Non-governmental agencies working inside Burundi have brought humanitarian assistance to a virtual halt in that country. The Secretary-General has concluded that these attacks violate the Convention and asked for enforcement of its provisions. *Letter dated 16 January*

The Safety Convention is an important effort to protect personnel who are not lawful targets. Other than the baseline protection of Common Article 3, the Geneva Conventions do not protect persons conducting noncombat operations or working in the midst of internal armed conflicts.¹⁸¹ This Convention closes an otherwise dangerous gap in international law. The Convention defines a wide range of criminal conduct towards United Nations personnel and associated persons.¹⁸² The

1996 *From the Secretary-General to the President of The Security Council*, U.N. Doc. S/1996/36 (Jan. 17, 1996).

¹⁸⁰*Protecting Peacekeepers*, *supra* note 176, at 622 n.7. At this time, 43 states have signed the Convention, and 4 have become Parties. For a current list of signatories and accession dates see http://www.un.org.Depts/Treaty/bible/Part_1_E/XVIII_8.html

¹⁸¹See *supra* note 4. Article 2 Common to the four Geneva Conventions provides the basis for application of the Conventions to international armed conflicts:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them. The Convention shall also apply to all cases of total or partial occupation of the territory of the High Contracting Party, even if the said occupation meets with no armed resistance.

¹⁸²Article 9 prohibits the "intentional commission" of murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel. Article 9 also lists the following violations of the Convention:

A violent attack upon the official premises, the private accommodation or the means of transportation of any United

Convention protects United Nations and associated personnel who are not engaged as combatants in an international armed conflict.

In contrast, some Chapter VII peace enforcement operations entail low levels of consent and questionable impartiality which can involve the United Nations personnel in international armed conflicts. Article 2, therefore, provides that the Convention shall not apply to enforcement actions under Chapter VII in which forces "are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."¹⁸³

The laws of war do apply to United Nations sanctioned operations which rise to the level of international armed conflicts. In those situations, the legal and doctrinal watershed is clear. Field Manual 100-23 accordingly notes that "from a doctrinal point of view, these two operations [Korea

Nations or associated personnel likely to endanger his or her person or liberty; A threat to commit any such attack with the objective of compelling a physical or juridical person to refrain from doing any act; An attempt to commit any such attack; and An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack.

Safety Convention, *supra* note 177, art. 9.

¹⁸³Id., art. 2, para. 2.

(1950-1953) and the Gulf War (1990-1991)] are clearly wars and must not be confused with PE [peace enforcement]."¹⁸⁴ Thus, the laws of war always define the rights of United States personnel and the corresponding duties of enemy forces during international armed conflicts.

In contrast, United Nations personnel deployed on operations other than war are not combatants, and are therefore not lawful targets. Persons who attack United Nations personnel during operations other than war generally violate the criminal code of the country where the act occurs. However, the climate of lawlessness which required United Nations action will often prevent the enforcement of criminal laws. By the same token, the civil officials who hinder United Nations operations will likely be the same officials responsible for enforcing the laws.

The Safety Convention captures the essence of what I mean by continuum crimes. The protections operate alongside the Geneva Conventions to provide a seamless band of protection across the spectrum of risk or conflict.¹⁸⁵ Soldiers and civilians enjoy different rights under the Safety Convention than they would during international armed conflicts because

¹⁸⁴FM 100-23, *supra* note 16, at 2.

¹⁸⁵United States Mission to The United Nations, Press Release No. 217-94 (Dec. 9, 1994).

the intent of international law varies. While the laws of war aim to minimize suffering during conflict, the Safety Convention seeks to help United Nations officials prevent international armed conflicts or escalation of internal violence.

Article 10 of the Safety Convention allows universal jurisdiction over persons who commit crimes against United Nations and associated personnel. It requires the United States to implement domestic legislation over some offenses, and allows jurisdiction over a wider category of crimes.¹⁸⁶

¹⁸⁶Safety Convention, *supra* note 177, art. 10 reads as follows:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases:

- (a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State.

2. A State Party may also establish its jurisdiction over any such crime when it is committed:

- (a) By a stateless person whose habitual residence is in that State; or
- (b) With respect to a national of that State; or
- (c) In an attempt to compel that State to do or abstain from doing any act.

3. Any State which has established jurisdiction s mentioned in paragraph 2 shall notify the Secretary-General of the United Nations. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General of the United Nations.

Assuming that Congress amends the UCMJ, United States commanders conducting peace operations would have explicit authority to use military forums to enforce the Convention. Within the context of overall mission requirements, criminal prosecutions could supplement other force protection efforts and thereby enhance all soldiers' inherent right of self defense.¹⁸⁷

Prosecutions could also help establish American credibility during the operation both in the area of operations and with the American people. For example, in May 1995 Serbian forces captured thirty-three British peacekeepers and 372

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

¹⁸⁷FM 100-23, *supra* note 16, at 16-17 ("The inherent right of self defense, from unit to individual level, applies in all peace operations at all times."). Commanders should be constantly ready to prevent, preempt, or counter activity that could bring significant harm to units or jeopardize mission accomplishment. In peace operations, commanders should not be lulled in to believing that the nonhostile intent of their mission protects their force. *Id.*

United Nations staff personnel.¹⁸⁸ A local official noted that "NATO has seriously discredited itself. They promised to chop off the hands [of the Serbian Army]. Instead, they delivered a slap on the wrists."¹⁸⁹ In another instance, Dutch peacekeepers made few efforts to defend the "safe area" of Srebrenica in part because the Serbs held Dutch soldiers hostage. As a result, the evidence indicates that the Serbs committed horrible atrocities around Srebrenica.¹⁹⁰

Military prosecutions could serve a valuable purpose if opposing forces likewise try to intimidate United States Armed Forces and manipulate United States policy by attacking our personnel. Prosecuting criminals could help control the overall climate of violence. Criminals cannot further agitate already delicate political climates if they are imprisoned for their crimes. Operations could be concluded more quickly if prosecutions enhance United States credibility. The Convention on the Safety of United Nations and Associated Personnel establishes a jurisdictional basis over foreign nationals who attack American soldiers or hinder peace operations.

¹⁸⁸Chris McLaughlin, et al., *Major Fears Bosnia Tragedy Bloodbath Warning as Tory Pressure for Pullout Grows*, THE SCOTSMAN, May 31, 1995, at 1.

¹⁸⁹Tom Hundley, *Defiant Serbs Round Up More UN Hostages*, CHI. TRIB, May 29, 1995, at 1.

¹⁹⁰Michael Dobbs & Christine Spolar, *Anybody Who Moved or Screamed Was Killed; Thousands Massacred on Bosnia Trek in July*, WASH. POST, Oct. 26, 1995, at A1.

Implementing the Convention through the UCMJ offers United States commanders a potentially valuable tool for minimizing American casualties and achieving the political objectives of the operation.

3. *The Crime of Torture*--The Convention Against Torture and Other Cruel, Inhuman, and Degrading Punishments (the Torture Convention) provides another jurisdictional basis for United States military courts.¹⁹¹

Torture is an abhorrent practice because victims are helpless and are not combatants under any definition. Torture threatens the very essence of human rights and personal dignity. Universal condemnation of torture makes it one of the most widely recognized international crimes.

The 1948 Universal Declaration of Human Rights, for example, stipulated that "[N]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."¹⁹² The Geneva Conventions prohibit "any form of

¹⁹¹Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 38 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention]. After the Torture Convention came into force for the United States on November 20, 1994, the State Department designated it as Treaty Doc. 100-20. See also Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 67 O.A.S.T.S., reprinted in 25 I.L.M. 519 (1986).

¹⁹²Universal Declaration of Human Rights, G.A. Res. 217 A(III), Dec. 10, 1948, U.N. Doc. A/810, art. 5 (1948), reprinted in 5

torture or cruelty" towards prisoners of war.¹⁹³ The Fourth Geneva Convention likewise forbids "physical or mental coercion against protected persons," which includes "any measure of such a character as to cause the physical suffering or extermination of protected persons."¹⁹⁴ Other multilateral¹⁹⁵ and regional human rights conventions¹⁹⁶ establish that torture or inhumane treatment violates the rights of all persons in time of peace as well as war.

With its unanimous adoption on December 10, 1984, the Torture Convention completed the evolution of international criminal law in the area. The Convention reserves criminal

MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 237-42 (1965) [hereinafter Universal Declaration].

¹⁹³Convention on Prisoners of War, *supra* note 4, art. 87.

¹⁹⁴Civilians Convention, *supra* note 4, arts. 31, 32.

¹⁹⁵International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force March 23, 1976.

¹⁹⁶See, e.g., American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, art. 5, ¶ 2, OEA/Ser. L./V/II.23 doc. rev. 2, entered into force July 18, 1978; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 3, entered into force Sept. 3, 1953, as amended by Protocol No. 3, entered into force Sept. 21, 1970, and Protocol No. 5, entered into force Dec. 21, 1971; African [Banjul] Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3 rev 5, arts. 4, 5, June 27, 1981, reprinted in 21 I.L.M. 58 (1982).

sanctions for egregious cases which are "an extreme form of cruel and inhuman treatment."¹⁹⁷ To commit a crime under the Torture Convention, the criminal must have a specific intent to cause severe pain and suffering, and the acts must result in severe mental or physical pain.¹⁹⁸ Finally, the Torture Convention limits criminal penalties to acts "inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in a public capacity."¹⁹⁹

The Torture Convention proscribes a relatively narrow band of conduct as a clear violation of international law, but proscribes that conduct in any type of conflict or internal process. The Convention does not restrict application of its terms. In fact, Article 2 states that criminals cannot cite exceptional circumstances such as war, national emergency, or superior orders as valid defenses to the crime of torture.²⁰⁰ The United States Senate gave its advice and consent to the Convention on October 27, 1990, thereby gaining jurisdiction for United States courts under the universal jurisdiction provisions of the Convention.²⁰¹

¹⁹⁷Torture Convention, *supra* note 191, art. 1.

¹⁹⁸*Id.*

¹⁹⁹*Id.*

²⁰⁰*Id.*, art. 2.

²⁰¹133 CONG. REC. S17486, No. 150 (daily ed. Oct. 27, 1990). The Senate gave its advice and consent subject to two reservations, five understandings, and two declarations. See *id.* at S17491-92; *The Phenomenon of Torture: Hearings and Markup on H.J. Res.*

The Torture Convention conveys jurisdiction to United States courts to prosecute torture as a continuum crime. While international law grants broad jurisdictional rights, the domestic legislation implementing those rights contains a critical omission. Congress determined that existing criminal statutes already penalize the acts which constitute torture if the offense takes place in any territory under United States jurisdiction or on board a ship or aircraft registered in the United States.²⁰² Pursuant to Article 5 of the Torture Convention, Congress extended federal court jurisdiction over torture if the offender "is a national of the United States" or the offender "is present in the United States, irrespective of the nationality of the victim or the alleged offender."²⁰³

605 *Before the House Comm. on For. Aff. and its Subcomm. on Human Rights and International Organizations*, 98th Cong., 2d Sess. 154-55 (1984).

²⁰²*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, EXEC. RPT. No. 30, 101st Cong. 2d Sess., at 20 (1990) (containing an excellent description of the United States position regarding every article of the Convention, and reproducing the text of Resolution of Ratification at 29-31). Congress identified a range of offenses already prohibited by federal and state law which would violate the terms of the Convention. DEP'T OF STATE, 1 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, 833-34 (1993).

²⁰³Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, Title V, § 506, 108 Stat. 382 (1994), codified at 18 U.S.C.A. § 2340A(b) (West 1984 and Supp.). The implementing legislation contained key definitions of terms for the purposes of federal criminal law (codified at

The statutes implementing the Torture Convention do not protect soldiers deployed on peace operations because they fail to exercise the full extent of United States authority under international law. If Congress "considers it appropriate," Article 5(1)(c) of the Torture Convention permits Congress to establish jurisdiction over any case of torture or inhuman treatment in which the victim is an American citizen.²⁰⁴ Citing the example of Colonel William Higgins,²⁰⁵ Congress recognized

18 U.S.C. § 2340), extended the statute of limitations for torture to 20 years (codified at 18 U.S.C. § 3286), enacted statutory punishments (codified at 18 U.S.C. § 2340A(a)), and specified that the implementing statutes did not prevent the application of State and local laws to criminal offenses which might also fit the definition of torture (codified at 18 U.S.C. § 2340B).

²⁰⁴Torture Convention, *supra* note 191, art. 5(1)(c).

²⁰⁵Gunmen abducted Lieutenant Colonel William Richard Higgins as he left for work on March 16, 1984. Colonel Higgins served as the head of a 75-member United Nations peacekeeping contingent serving in Lebanon. The Islamic Jihad claimed to have killed Higgins in October 1985 in retaliation for an Israeli air raid. A group calling itself the Organization of the Oppressed on Earth claimed it executed Higgins on July 31, 1989, and released a videotape of his hanging body. His captors dumped the body on the side of a road in December 1991, and an autopsy showed that he died while being tortured. Brooke A. Masters & James Naughton, *2 Slain Hostages Buried as Heroes; Families, Friends Ask That Buckley, Higgins Not Be Forgotten*, WASH. POST, Dec. 31, 1991, at A1. In the context of prosecuting continuum crimes, the plea of Colonel Higgins wife bears repeating, "[i]f we forgive, if we forget, if we thank these savages, then we are merely inviting them, at a time and place they select, to kill again. Shame on us if we do." *Id.*

that American soldiers serving in peace operations have been captured, tortured, and murdered.²⁰⁶ Nevertheless, Congress did not enact a statutory basis for jurisdiction over persons who torture American soldiers or citizens abroad. The legislative history is absolutely silent on any reason why Congress declined to extend United States jurisdiction to the full extent granted by international law.²⁰⁷

Unless domestic courts attain personal jurisdiction over the offender, the only remedy for crimes committed against American soldiers is in foreign domestic courts. Because only persons acting under color of official authority are capable of committing the crime of torture, foreign courts can be expected to ignore violations by their officials. Even in the rare case where foreign authorities collect available evidence, and desire to prosecute offenders, foreign judicial systems are often incapable of enforcing criminal laws during operations other than war.²⁰⁸

²⁰⁶H.R. CONF. REP. No. 482, 103d Cong., 2d Sess. (1994)

²⁰⁷Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, 1994 U.S.C.C.A.N. (108 Stat. 382) 302-517.

²⁰⁸In Somalia, United States Armed Forces concluded that the task of "facilitating the restoration of a police force (within legal parameters) and a judicial system was a requirement and a challenge." CENTER FOR ARMY LESSONS LEARNED, U.S. ARMY COMBINED ARMS COMMAND, OPERATION RESTORE HOPE LESSONS LEARNED REPORT (3 Dec. 1992-4 May 1993), XIV-39 (1993).

Due to the abhorrent nature of torture and the lawless environment common to peace operations, Congress should take every available step to protect American soldiers. Since preventing torture is a major goal of United States foreign policy, Congress has used domestic statutes to advance human rights and help prevent torture by foreign governments.²⁰⁹ The Torture Convention provides a vehicle for translating abstract commitment into concrete legal remedies.

As another benefit of expanded punitive power, American soldiers would not automatically pay the price for legislative oversight. If Americans suffer torture at the hands of foreign nationals, the commander should have an available tool to punish the offender and prevent recurrence. Allowing deployed commanders to enforce the Torture Convention in military tribunals could close a dangerous gap in United States

²⁰⁹Joint Resolution Regarding the Implementation of the Policy of the United States Government in Opposition to the Practice of Torture by any Foreign Government, Pub. L. No. 98-447, Oct. 4, 1984, 98 Stat. 1721 (1984) ("the Congress reaffirms that it is the continuing policy of the United States to oppose the practice of torture by foreign governments through public and private diplomacy and, when necessary and appropriate, through the enactment and vigorous implementation of laws intended to reinforce United States policies with respect to torture."). See also 22 U.S.C. § 262d (1995) (advancement of human rights by United States assistance policies with international financial institutions); 22 U.S.C. § 2151n (1995) (linking human rights records with development assistance); 22 U.S.C. § 2222 (1995) (granting funds to support the United Nations Voluntary Fund for Victims of Torture).

enforcement authority while contributing to the accomplishment of the mission.

B. *Historic International Tribunals*

The Nuremberg and Tokyo trials, along with numerous national prosecutions after World War II,²¹⁰ are the most visible examples of enforcing international law through criminal sanctions.²¹¹ The World War II prosecutions of war criminals gave birth to the modern international law of human rights.²¹² The legacy of the World War II trials shines through the clutter of world events.

²¹⁰HOWARD S. LEVIE, *TERRORISM IN WAR-THE LAW OF WAR CRIMES* 135-39, 179-82 (1992) (citing postwar statistics for the European and Far Eastern theaters respectively); DEP'T OF ARMY, PAMPHLET 27-161-2, *INTERNATIONAL LAW*, VOL. II 234-35 (23 Oct. 1962) (citing statistics of national prosecutions) [hereinafter DA PAM 27-161-2]; M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, *IND. INT'L & COMP. L. REV.* 1, 5 n.17 (Spring 1991) (citing sources of national prosecution statistics).

²¹¹It is incorrect to maintain that the World War II trials are the only historic example of international forums prosecuting violations of international law. In 1647, a tribunal of judges from Alsace, Switzerland, and other members of the Holy Roman Empire heard the case against the Burgundian Governor of Breisach, Peter von Hagenback. The accused tried to justify his troops' crimes against civilians based on a defense of superior orders, which the panel rejected. The international panel ruled that the defense of superior orders was contrary to the law of God, and sentenced Hagenback to death. See G. SCHWARZENBERGER, 2 *INTERNATIONAL LAW, INTERNATIONAL COURTS* 462-66 (1968).

²¹²Fogelson, *supra* note 150, at 833.

Even after a half century of human suffering, the World War II prosecutions impact international law just as sunlight penetrates darkness. As Justice Jackson wrote to President Truman, enforcing international law through criminal forums can only "strengthen the bulwarks of peace and tolerance."²¹³ United States jurisdiction to prosecute continuum crimes relies in part on legal authority first articulated and refined in the wake of World War II.

1. *The Nuremberg Precedent*--History has not borne the fruits of Justice Jackson's hope that the Nuremberg principles would "become the condemnation of any nation that is faithless to them."²¹⁴ Scholars have tried in vain to refine a definitive list of Nuremberg principles.²¹⁵ Nevertheless, the Nuremberg trials were a pivotal event in world history because they

²¹³Report to the President By Mr Justice Jackson, Oct. 7, 1945, in DEP'T OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS 432, 439 (1945).

²¹⁴*Id.* See also Graham T. Blewitt, *Ad Hoc Tribunals Half a Century after Nuremberg*, 149 Mil. L. Rev. 101-02 ("Nuremberg was a success but the Cold War left it sitting on the shelf for almost 50 years. During that time the world has been dripping with blood. The hope the world would never see the suffering inflicted during World War II has not been realised and the suffering and death has been repeated again and again.").

²¹⁵See, e.g., *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal*, 2 Y.B. INT'L L. COMM. 374-380 (1950); Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, in JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 359-402 (1990).

demonstrated that international law embodies universal moral values which can transcend theory to support criminal judgments.²¹⁶ Despite some criticism,²¹⁷ several aspects of the Nuremberg experience affect the authority of United States military forums to enforce international law.

In the first place, the Nuremberg Trials established beyond question that individual perpetrators can commit international crimes. Perpetrators cannot evade criminal responsibility by arguing that international conventions apply only to sovereign states. For example, the Nuremberg Tribunals prosecuted violations of the Convention Respecting the Law and Customs of War on Land²¹⁸ and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.²¹⁹ While some modern conventions provide for the jurisdiction of certain courts, individuals can commit international crimes even

²¹⁶Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals rather than States*, 32 AM. U. L. REV. 1 (1982).

²¹⁷See generally DONALD A. WELLS, *WAR CRIMES AND LAWS OF WAR* 81-118 (1984); Orville C. Snyder, *It's Not Law-War Guilt Trials*, 38 KY. L.J. 81 (1949); A. BRACKMAN, *THE OTHER NUREMBERG* (1987); R. CONOT, *JUSTICE AT NUREMBERG* (1983); A. TUSA & J. TUSA, *THE NUREMBERG TRIAL* (1983).

²¹⁸Oct. 18, 1907, 36 Stat 2277, I Bevans 631 [hereinafter Hague IV].

²¹⁹Opened for signature July 27, 1929, 47 Stat. 2021 (1932).

without specific jurisdictional provisions.²²⁰ Nuremberg established the common sense principle that states comply with international obligations only if public officials understand and obey those duties. Personal obligations cannot be divorced from legal duties of the state. The Tribunals enforced otherwise abstract international law against the individuals who committed real crimes against real victims.

For the same reasons, the Nuremberg trials recognized the principle that every state can punish persons who violate the laws of war. Since international law can create individual

²²⁰Meron, *supra* note 40, at 562. Violations of international law need not be defined with absolute letter perfect clarity in all cases. The outer limit to this principle lies in the prohibition on ex post fact laws which is at the very root of the Western notion of judicial fairness. The corresponding principle of international law is known as *nullem crimen sine lege*, which literally means "no penalty without law." Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937) ("[N]o conduct shall be criminal unless it is specifically described in a penal statute.").

No defendant at Nuremberg successfully raised the defense because the facts showed that the German government knew that its conduct violated treaty obligations as well as customary international law. See generally DA PAM 27-161-2, *supra* note 210, at 236-38 (describing the raising of the defense at Nuremberg); Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUM. L. REV. 1491, 1533 (1987) (the "ex post facto prohibition occupies a different status in the international field than in the domestic field, for the basic reason that international law has no legislature to pass statutes defining acts as criminal. International law is not a product of statutes, but of treaties, conventions, judicial decision, and customs. It is the gradual expression, case by case, of the moral judgments of the civilized world").

obligations, all nations have jurisdiction to enforce those obligations. All four Geneva Conventions require states to "enact any legislation necessary to provide effective penal sanctions" against war criminals."²²¹ The Geneva Conventions also require each state to search for "persons alleged to have committed, or to have ordered committed, such grave breaches", and "bring such persons, regardless of their nationality, before its own courts."²²² Codified international law thus recognizes the jurisdiction of all states over war criminals,²²³

²²¹Convention on Sick and Wounded, *supra* note 4, art. 49; Convention on Sick and Wounded at Sea, *supra* note 4, art. 50; Convention on Prisoners of War, *supra* note 4, art. 129; Civilians Convention, *supra* note 4, art. 146. The cited article is reprinted in FM 27-10, *supra* note 4, para. 506. The term "war crimes" is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime. *Id.* para. 499. The provisions of Article 18 and Article 21, UCMJ, meet this treaty obligation on the part of the United States. Other nations have enacted special legislation for the same purpose.

²²²The Conventions define "grave breaches" uniformly with only slight variations as: willful killing, torture or inhuman treatment, to include biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. The Conventions Protecting Prisoners of War and Civilians also include prohibitions on compelling a prisoners of war (or protected persons respectively) to serve in the forces of the hostile Power, and willfully depriving a prisoner of war (and protected persons respectively) of the rights of fair and regular trial prescribed in the applicable Convention. See FM 27-10, *supra* note 4, para. 502.

²²³RESTATEMENT, *supra* note 12, § 404; Richard R. Baxter, *The Municipal and International Law Basis of Jurisdiction over War*

and incorporates concrete measures to facilitate prosecution by states.²²⁴ Based on the principle of universal jurisdiction, national forums have prosecuted the vast majority of war crimes cases.²²⁵

Crimes, 23 BRIT. Y.B. INT'L L. 382-93 (1951); William Cowles, *Universality of Jurisdiction over War Crimes*, 33 CALIF. L. R. 177-218 (1945); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 706-721 (1961).

²²⁴For example, war crimes do not qualify as political offenses which would prevent extradition to a country seeking jurisdiction. See G.A. Res. 3, U.N. Doc. A/50 (1946); G.A. Res. 170, U.N. Doc. A/425 (1947); Genocide Convention, *supra* note 11, art. 7. The General Assembly approved by a vote of 58 to 7 The Convention on the Non-Applicability of Statutory Limitations on War Crimes and Crimes Against Humanity, G.A. Res. 2391, 23 G.A.O.R., Supp. No. 19, at 40, U.N. Doc. A/7218 (1969), reprinted in 8 I.L.M. 69 (1969). See also Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII), 28 U.N. GAOR, Supp. No. 30A, at 78, U.N. Doc. A/9030/Add/1 (1973).

²²⁵The International Military Tribunal at Nuremberg returned verdicts on only 22 defendants. NORMAN E. TUTOROW, *WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK* 10 (1986). The texts of judgment and the sentences are reprinted in 41 AM. J. INT'L L. 172-332 (1947). The international tribunal at Tokyo tried 28 Japanese defendants. TUTOROW, *supra*, at 15. These men "were not just ordinary criminals, they were the leaders of empires, which sought to dominate the world by terror, using genocide and crimes against humanity as major tools to achieve their goals." Blewitt, *supra* note 214, at 102. By virtue of a separate international agreement, the United States alone tried another 185 defendants at Nuremberg. TUTOROW, *supra*, at 11.

In contrast, by late November 1948, a total of 7109 defendants had been arrested for war crimes. By the end of 1958, the Western Allies had sentenced 5025 Germans for war crimes, of whom 806 received death sentences (although only 486

Finally, since all states have jurisdiction over war criminals, Nuremberg rebutted the right to justify criminal acts based on the defendant's official position. Perpetrators cannot avoid criminal liability by hiding behind the political or military structure of another sovereign state.²²⁶ United States Army doctrine states that "the fact that a person who committed an act which constitutes a war crime acted as the

were actually executed). The Soviet Union convicted around 10,000. VON GLAHN, *supra* note 155, at 882-83. For a fascinating discussion of the process and legal principles followed in post-War Germany by American military tribunals, as well as long lists of cases, charges, and sentences see U.S. ARMY JUDGE ADVOCATE GENERAL, REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, EUROPEAN COMMAND, JUNE 1944-JULY 1948 (1948).

²²⁶The Nuremberg Tribunal thus stated:

[I]t was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected ... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of the law be enforced. The authors of these acts cannot shelter themselves behind their official position in order to be freed from the punishment in appropriate proceedings.

1 I.M.T., *supra* note 2, at 222-23.

head of a State or as a responsible government official does not relieve him from responsibility for his act."²²⁷

From the opposite perspective, soldiers cannot defend unlawful acts by shifting responsibility up the chain of command. Despite clear regulations to the contrary,²²⁸ defendants at Nuremberg often tried to shift responsibility to superiors who ordered illegal actions. The London Charter mandated that defendants who acted pursuant to military orders remained responsible for their actions.²²⁹ The modern rule of law applies criminal sanctions to public officials who issue orders and subordinates who commit crimes pursuant to those orders.

The legacy of Nuremberg impacts potential prosecution of continuum crimes. Nuremberg removed legalistic shadows which could cover criminals so long as they could show some official

²²⁷FM 27-10, *supra* note 4, para. 510.

²²⁸Article 47 of the German Military Code of 1872 stated that a subordinate is liable to punishment as an accomplice if he knew that the order involved an act the commission of which constituted a civil or military crime or offense. Article 47 is discussed at length in the High Command case, *United States v. Von Leeb*, reprinted in II THE LAW OF WAR: A DOCUMENTARY HISTORY 1431-32 (Leon Friedman ed., 1972). For an excellent discussion of the command responsibility issues raised by the High Command Case see W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 38-58 (1972).

²²⁹London Charter, *supra* note 12, art. 8. See also FM 27-10, *supra* note 4, para. 509 (Defense of Superior Orders).

purpose for their crimes. The United States can exercise universal jurisdiction over war criminals, but continuum crimes include a broader class of offenses. Nuremberg recognized that the law is not a static relic, but a tool which evolves "from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."²³⁰ United States ability to prosecute continuum crimes relies on defining the bounds of international criminal law and establishing domestic authority for exercising jurisdiction.

2. *The Tokyo Trials*--The International Military Tribunal for the Far East reinforced the same principles of individual responsibility and universal jurisdiction as its Nuremberg counterpart.²³¹ The Tokyo Tribunal had a special authority to reinforce binding rules of international law because of its

²³⁰The quoted language is from the Martens clause which formed the preamble to Hague IV Convention, *supra* note 218. See also Protocol I, *supra* note 4, art. 1, para. 2 ("In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience.").

²³¹WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 186 (2nd ed. 1962). Copies of the 1218 page judgment and individual opinions rendered November 4-12, 1948, are available at the United States Army Judge Advocate General's School, Charlottesville, Virginia. Key excerpts are reprinted in U.S. NAVAL WAR COLLEGE, *INTERNATIONAL LAW DOCUMENTS 1948-1949*, 71-107 (1950). See also DEP'T OF STATE, *11 DIGEST OF INTERNATIONAL LAW* 960-1017 (Marjorie Whiteman ed., 1962) [hereinafter Whiteman]; Horwitz, *The Tokyo Trial*, *INT'L CONC.* No. 465 (1950).

composition.²³² The Tribunal's eleven members represented non-Western powers, as well as some minor powers.²³³ The Japanese government also accepted the principle that war criminals would receive "stern justice."²³⁴ The Tokyo Tribunal represented a tangible exercise of international justice which enforced international law.

The Tokyo Tribunal also had a unique impact on the possible prosecution of continuum crimes in modern United States military forums. The Tokyo Tribunal helped define the role of international law in American military tribunals. The Supreme Court refused to consider petitions for *habeas corpus* arising from decisions of the Tokyo Tribunal.²³⁵ As the Supreme

²³²Dr. John Pritchard, *The International Military Tribunal for the Far East and its Contemporary Resonances* 2, 149 MIL L. REV. 25, 28.

²³³The members of the Tribunal were, Sir William Webb (Australia), Judge Stuart E. McDougall (Canada), Mei Ju-Au (China), Judge Jenri Bernard (France), Judge R. M. Pal (India), Lord Patrick (England), Judge Bernard Roling (Netherlands), Justice Erima H. Northcraft (New Zealand), Justice Delfin Jaranilla (Philippines), Justice I.M. Zaryanov (Soviet Union), Major General Myron H. Cramer (United States, replacing Justice John D. Higgins in June 1946). Whiteman, *supra* note 231, at 972.

²³⁴*In re Yamashita*, 327 U.S. at 10. This language echoed Paragraph 10 of the Potsdam Declaration of July 26, 1945 which declared that "stern justice shall be meted out to all war criminals, including those who have visited cruelties on our prisoners." 13 DEP'T OF STATE BULLETIN 137-38 (July 29, 1945).

²³⁵*Hirota v. MacArthur, General of the Army*, 338 U.S. 197, 69 S.Ct. 197, 93 L.Ed 1902 (1948) This is a per curiam opinion

Allied Commander, General MacArthur issued the Proclamation establishing the Tribunal, approved the Charter of the Tribunal, appointed the eleven judges, and served as the appellate authority to review the Tribunal's findings.²³⁶ The

which also resolved *Dohihara v. MacArthur*, General of the Army, et al, Petition No. 240, and *Kido et. al. v. MacArthur*, General of the Army, et al., *rehn'g denied* 335 U.S. 906 (1949) [hereinafter *Hirota*]. *Accord Adachi v. MacArthur*, Unreported Case, MS Department of State File No. 611.942/2-1350 (*Habeas Corpus* No. 3562) (holding that Japanese officers convicted by a commission composed of one Australian and five American officers "was a military commission of international character with its existence and jurisdiction rooted in the sovereignty of the Far Eastern Commission, acting through its sole executive agency, the Supreme Commander for the Allied Powers); *Nash on behalf of Takeshi Hashimoto et al. v. MacArthur*, General of the Army, et al., 184 F.2d 606 (D.C. Cir. 1950); *Toneo Shirakura et al. v. Royall*, 89 F. Supp. 711, 713 (1948), *motion for reconsideration denied* 89 F. Supp. 713 (D.D.C. 1949) ("With the sentence of the military tribunal of the conqueror, whether in the Philippine Islands, or Nuremberg, or at Tokyo, a District Court of the United States has neither the power to interfere nor the responsibility. Correction of errors must lie with the political branches of government or with what courts may have the power to act.").

Mr. Justice Jackson filed a special memorandum which stated his views as to participation in the decisions despite his prominent role at Nuremberg. 335 U.S. 876 (1948), *reprinted in* II THE LAW OF WAR: A DOCUMENTARY HISTORY 1184-1187 (Leon Friedman ed., 1972). Justice Jackson understood the significance of the cases, and felt that he should break a developing four to four tie because "the issues here are truly great ones. They only involve decision of war crimes issues secondarily, for primarily, the decision will establish or deny that this Court has power to review exercises of military power abroad and the President's conduct of external affairs of our Government." *Id.* at 1186.

²³⁶For the Proclamation of January 19, 1946, and General Orders No. 1 and 20 containing the Charter, see T.I.A.S. 1589, *reprinted in* 14 DEP'T OF STATE BULLETIN 361-64 (Mar. 10, 1946), and

President also issued an Executive Order appointing the Chief Counsel.²³⁷ The Tribunal consumed one-fourth of the paper used by the occupation forces, and had to be resupplied at one point by American B-29 bombers.²³⁸

Despite the vital United States role, the Supreme Court wrote that General MacArthur acted "as the agent of the Allied Powers."²³⁹ Federal courts therefore had no power to review, affirm, or annul the Tribunal's proceedings. In a thoughtful concurrence, Justice Douglas recognized that the Tokyo Tribunal was an international one arranged through negotiation with the Allied Powers.²⁴⁰ Justice Douglas concluded that "the Tokyo Tribunal acted as an instrument of political power of the Executive Branch of Government."²⁴¹ The Supreme Court recognized that international law and international obligations can alter the legal nature of American military forums.

U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS 1946-1947 317-326 (1947).

²³⁷Exec. Order No. 9660, 10 Fed. Reg. 14591 (Nov. 30, 1945) (appointing Mr. Joseph B. Keenan as the "Chief of Counsel in the preparation and prosecution of charges of war crimes against the major leaders of Japan and their principal agents and accessories").

²³⁸Pritchard, *supra* note 232, at 26.

²³⁹Hirota v. MacArthur, General of the Army, 338 U.S. at 198.

²⁴⁰*Id.* at 208.

²⁴¹*Id.* at 215.

Justice Bernard's concurrence to the Tribunal's judgment echoed the Supreme Court's sentiment. He concluded that "a Universal authority would be the one competent to create tribunals to judge individuals accused of crimes against universal order."²⁴² In essence, President Truman and the Allies enforced international law because there was no other organism with similar authority and resources.

The modern conduct of peace operations presents a striking parallel. Chapter VII allows the United Nations Security Council to decide what measures are necessary to implement its decisions, and call on member states to apply such measures.²⁴³ Chapter VII powers encompass a variety of actions so long as the goal is to remedy perceived threats to international peace and security.²⁴⁴ The Security Council exercised Chapter VII

²⁴²Whiteman, *supra* note 231, at 974.

²⁴³U.N. CHARTER art. 41. See also S.C. Res. 678, UN SCOR, 45th Sess., Res. & Dec. at 27-28, U.N. Doc. S/INF/46 (1990), reprinted in 29 I.L.M. 1565 (1990) (authorizing "all necessary means" to drive Iraq from Kuwait and "to restore international peace and security in the area").

²⁴⁴The Secretary General described the variety of Security Council functions as including diverse activities such as:

the supervision of ceasefires, the regroupment and demobilization of forces, their reintegration into civilian life and the destruction of their weapons; the design and implementation of demining programmes; the return of refugees and displaced persons; the provision of humanitarian assistance; the supervision of existing administrative structures; the establishment of new police forces; the verification of respect for human rights; the

enforcement authority to establish tribunals to enforce international law in Rwanda²⁴⁵ and the Former Yugoslavia.²⁴⁶

One step away from establishing tribunals, the Security Council authorized member states to use "all necessary measures" against Somalis responsible for unprovoked attacks against UNOSOM II personnel.²⁴⁷ The Security Council defined measures against suspected criminals as "including to secure investigation of their actions and their arrest and detention for prosecution, trial, and punishment."²⁴⁸ Pursuant to this authority, United States forces had authority to use force to

design of constitutional, judicial, and electoral reforms; the observation, supervision, and even the organization and conduct of elections; and the coordination of support for economic rehabilitation and reconstruction.

Agenda for Peace II, *supra* note 110, at 6.

See also Frederick L. Kirgis Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 522-39 (1995); M. Jennifer MacKay, *Economic Sanctions: Are They Actually Enforcing International Law in Serbia-Montenegro?*, 3 TUL. J. INT'L & COMP. L. 203 (1995).

²⁴⁵Rwanda Statute, *supra* note 105.

²⁴⁶S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

²⁴⁷S.C. Res. 837, *supra* note 125, ¶ 5.

²⁴⁸*Id.* See also S.C. Res. 865, U.N. SCOR, 48th Sess., 3280th mtg., U.N. Doc. S/RES/865 (1993) (reaffirming that those who attack UNOSOM II personnel would be held criminally responsible for the attacks).

capture and detain suspected criminals defined by the Security Council.²⁴⁹

Since the Security Council authorized "all necessary measures", the Secretary General could also have requested United States forces to prosecute detainees. The Security Council's unrestricted delegation of authority would have arguably allowed United States military tribunals to prosecute the persons described by Resolution 837 even without a specific request from the Secretary General. Under the auspices of the Security Council, United States military tribunals would enforce international law under international authority.

Just as President Truman exercised his executive authority after World War II, the President exercises the authority of the United States in the field of foreign relations.²⁵⁰ With the President's concurrence, United States commanders could enforce international law and would act as international tribunals.²⁵¹ The punitive power of tribunals convened under Chapter VII authority would therefore arise from international law and not from the UCMJ.

²⁴⁹Telephonic interview with Major Frank Fountain, February 5, 1996. Major Fountain served with United States forces deployed to Somalia during Operation Restore Hope.

²⁵⁰United States v. Curtiss-Wright Corp., 299 U.S. 304, 318-21 (1936).

²⁵¹Hirota v. MacArthur, General of the Army, 338 U.S. at 198.

Nevertheless, the Security Council cannot compel United States commanders to prosecute international criminals. The decision to prosecute a particular person remains in the hands of United States authorities subject to the availability of evidence and the overall tactical situation. A military tribunal initiated under the authority of the Security Council would in essence be an international forum capable of punishing any international offense prescribed by the Security Council.²⁵² Despite this additional basis for subject matter jurisdiction, the existing provisions of the UCMJ prevent the commander from establishing personal jurisdiction over foreign nationals during operations other than war.

C. Crimes Under Customary International Law

Enforcing international law under the auspices of Chapter VII allows the commander to prosecute crimes beyond classic "war crimes."²⁵³ Pursuant to Chapter VII authority, United

²⁵²*Id.* ("We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States."). After a more rigorous analysis than the per curiam opinion, Justice Douglas noted that "[H]ere the President did not utilize the conventional military tribunals provided by the Articles of War. He did not act alone but only in conjunction with the Allied Powers. This tribunal was an international one arranged through negotiation with the Allied Powers." *Id.* at 208

²⁵³See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 130 (1987) (war crimes "consist of conduct which is prohibited by the rules of

States military forums could enforce multilateral treaties, as well as the broader class of criminal international human rights violations. Just as the Nuremberg and Tokyo Tribunals defined and enforced existing international law, the Security Council does not invent international criminal law. Taken together, the potpourri of treaties, state practice, General Assembly resolutions, International Court of Justice opinions, and Security Council actions entitle every human to certain fundamental rights.²⁵⁴ International law recognizes a range of human rights violations which occur short of the international armed conflict threshold.

Phrased another way, international human rights law criminalizes a range of offenses which are subject to the universal jurisdiction of all states.²⁵⁵ The evolution of human

international law applicable in armed conflict, conventions to which the parties are Parties, and the recognized principles of international law of armed conflict").

²⁵⁴Vladimir Kartashkin, *Human Rights and Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 202 (Lori F. Damrosch & David Scheffer eds., 1991).

²⁵⁵RESTATEMENT, *supra* note 12, § 702, cmt. n ("Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void.); See also *id.* § 404. *Jus cogens* norms are binding on all states. The class of *jus cogens* norms is distinct in international law because they derive from a common heritage of mankind and impose natural law values on all persons, all systems, all states, and apply at all times. Jonathan I. Chaney, *Universal International Law*, 87 AM. J. INT'L L. 529, 541 (1993).

rights law has been the dominant trend in international law during the last half century.²⁵⁶ The United Nations Charter obligates states to seek "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."²⁵⁷

In the wake of the United Nations Charter, the General Assembly passed numerous resolutions promoting human rights,²⁵⁸ and the world's regional organizations enacted treaties

²⁵⁶Thomas Buergenthal, *The Human Rights Revolution*, 23 ST. MARY'S L.J. 3, 4 (1991).

²⁵⁷U.N. CHARTER art. 1, para.3.

²⁵⁸See, e.g., G.A. Res. 95, U.N. GAOR, 1st Sess., U.N. Doc. A/RES/95 (1946) (affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal); G.A. Res. 2444, U.N. GAOR, 23rd Sess., U.N. Doc. A/RES/2444 (1968) (recognizing the necessity of applying basic humanitarian principles in all armed conflicts and affirming certain principles to be observed in armed conflict); G.A. Res. 2712, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2712 (1970) (calling on states to try and punish persons who have committed war crimes and crimes against humanity); G.A. Res. 260, U.N. GAOR, 3rd Sess., U.N. Doc. A/RES/260 (1948) (approving and proposing for signature the Convention on the Prevention and Punishment of the Crime of Genocide); G.A. Res. 1904, 18 U.N. GAOR, Supp. No. 15, at 35 (referring to the "duty of states to fully and faithfully observe the provisions of the Universal Declaration [of Human Rights]."); G.A. Res. 2625 (XXV), U.N. Doc. A/RES/8082 (1970) ("Every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter... The principles of the Charter which are embodied in this Declaration constitute basic principles of international law.").

designed to protect human rights.²⁵⁹ Modern international law entitles ordinary people to "rights that belong to them as members of the international community."²⁶⁰ International Court

²⁵⁹See, e.g., American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, OEA/Ser. L./V/II.23 doc. rev. 2, entered into force July 18, 1978; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, entered into force Sept. 3, 1953, as amended by Protocol No. 3, entered into force Sept. 21, 1970, and Protocol No. 5, entered into force Dec. 21, 1971; African [Banjul] Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3 rev 5, June 27, 1981, reprinted in 21 I.L.M. 58 (1982).

²⁶⁰Buergenthal, *supra* note 256, at 6. The Preamble to the Protocol Additional to the American Convention on Human Rights suggests that human rights instruments simply codify what is already inherent to the nature of humanity. The Protocol recognized that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states. 28 I.L.M. 161 (1989). The logical corollary to the development of human rights has been the shifting views of sovereignty. Since all individuals possess a body of rights simply due to their existence as human inhabitants of the planet, governments cannot disregard those rights with impunity. According to one scholar, sovereignty of a state is now derived from the will of the people, and not from the illegitimate possession of power. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990). Thus, a government that disregards the basic human rights of its citizens "cannot hide behind the protective shield of sovereignty." *Id.* at 872.

Some United States courts have recognized that the concept of *jus cogens* might have a domestic legal effect. See, e.g., *U.S. Citizens of Nicaragua v. Reagan*, 859 F.2d 929, 273 U.S. App. D.C. 266 (1988) ("If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law."). *But c.f.* *Princz v.*

of Justice decisions also establish the consistency of customary human rights law.²⁶¹ Chapter VII enforcement authority arises because "human rights have finally been removed from the exclusive jurisdiction of states and lifted up into the realm of international concern."²⁶² The term continuum crimes encompasses an array of human rights law which operates alongside the codified laws of war.

Human rights instruments, multilateral treaties, and the laws of war combine in a complicated interplay of rights and

Federal Republic of Germany, 26 F.3d 1166, 1182 (D.C. Cir. 1994) (holding that the district court did not have subject matter jurisdiction under the Foreign Sovereign Immunities Act, and overruling the dissent argument that Germany waived its sovereign immunity from 1942 to 1945 by violating *jus cogens* norms condemning enslavement and genocide).

²⁶¹See, e.g., *Nuclear Tests (Australia v. France)*, 1974 I.C.J. 253, 303 (December 20, 1974) (Opinion of Judge Petren); *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16. (June 21, 1971).

²⁶²Bartram S. Brown, *The Protection of Human Rights In Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 214 (1992). For example, violations of human rights by the Republic of South Africa, have been on the agenda of almost every General Assembly. The Security Council declared that South African violations disturbed international peace and security, called for an arms embargo against that country, and took the first action under Chapter VII against that country upon a finding that its policies were "fraught with danger to international peace and security." S.C. Res. 181, 18 U.N. SCOR, U.N. Doc. S/INF/18/Rev. 1, at 7 (1963). See also S.C. Res. 421, U.N. SCOR, 32d Sess., 2052d mtg., U.N. Doc. S/RES/421 (1977).

obligations.²⁶³ In general, human rights law applies at all times, treaties apply when the conduct meets the definition in the instrument, and the laws of war apply during an armed conflict within the meaning of Article 2 of the Geneva Conventions.²⁶⁴ The United Nations Security Council uses the phrase "laws or customs of war" as a shorthand term describing all of the humanitarian obligations which arise during internal or international armed conflicts.²⁶⁵ Using the Security Council definition, the "laws or customs of war" nearly coincide with my conception of continuum crimes. Using either phrase, human rights law meshes with the law of war to create a modern system in which "the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned."²⁶⁶

²⁶³See Dietrich Schindler, *Human Rights and Humanitarian Law: The Interrelationship of the Laws*, 31 AM. U. L. REV. 935 (1982); Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW 345 (T. Meron ed., 1984) [hereinafter Dinstein]; G. Draper, *Human Rights and the Law of War*, 12 VA. J. INT'L L. 326 (1972).

²⁶⁴The Geneva Conventions apply during "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if a state of war is not recognized by one of them." Civilians Convention, *supra* note 4, art. 2, para. 1; Convention on Prisoners of War, *id.*; Convention on Sick and Wounded, *id.*; Convention on Sick and Wounded at Sea, *id.*

²⁶⁵Statute of the International Tribunal, *supra* note 172, art. 3.

²⁶⁶Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT Doc. IT-94-1-AR72, at 54

1. *Common Article 3 Protections*--The provisions of Article 3 of the Geneva Conventions provide a perfect vehicle for analyzing this interrelated web of law. Article 3 of each Convention applies identical language to "armed conflict not of an international character."²⁶⁷ Common Article 3 specifies a series of protections for "persons taking no part in hostilities" which "each Party shall be bound to apply, as a minimum."²⁶⁸ Unlike the class of grave breaches of the Geneva Conventions, no treaty identifies violations of Common Article 3 as international crimes. Some scholars therefore conclude that humanitarian law applicable to noninternational armed

(quoted language precedes and helps explain the Yugoslavia Tribunal's Appeal Chamber ruling that the phrase "laws or customs or war" proscribed by article 3 of the Statute of the Tribunal applies to war crimes "regardless of whether they are committed in internal or international armed conflicts." *Id.* at 68.)).

²⁶⁷Civilians Convention, *supra* note 4, art. 3; Convention on Prisoners of War, *id.*; Convention on Sick and Wounded, *id.*; Convention on Sick and Wounded at Sea, *id.*

²⁶⁸*Id.* Common Article 3 prohibits the following acts: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; (b) taking of hostages, (c) outrages upon personal dignity, in particular humiliating and degrading treatment, and (d) the passing of sentences and the carrying out of executions without the previous judgment (sic) pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

conflicts "does not provide for international penal responsibility of persons guilty of violations."²⁶⁹

Criminal liability for violations of Common Article 3 arises from the substantial body of custom and precedent which prohibit the underlying acts. The Nuremberg legacy dispels any argument that customary international law cannot warrant criminal penalties. By 1949 standards, Common Article 3 was a "radical transformation of the law" because it applied international obligations to internal conflicts.²⁷⁰ The weight of current customary law undercuts the absence of express criminal prohibitions in the text of Article 3 just as moving water erodes a river bank.

After almost fifty years' existence as a legal norm, Common Article 3 reflects the "universal contemporary

²⁶⁹Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts*, 30 INT'L REV. RED CROSS 409, 414 (1990). See also Meron, *supra* note 40, at 559 n.25 (comments by the United Nations War Crimes Commission (for Yugoslavia) to the effect that "the only offenses committed in internal armed conflict for which universal jurisdiction exists are crimes against humanity and genocide," these comments preceded the appellate rulings of the International Tribunal for the Former Yugoslavia which concluded otherwise).

²⁷⁰Richard R. Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165, 168 (1978).

recognition that fundamental human rights exist." ²⁷¹ The existence of such basic human rights requires a corresponding duty for all states to respect and observe those rights. ²⁷² Therefore, Common Article 3 defines international crimes because all parties must respect an international obligation "that is so essential for the protection of fundamental interests that its breach is recognized as a crime by the international community as a whole." ²⁷³

In this light, Pictet commented in 1958 that Article 3 "merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question long

²⁷¹Memorial of the Government of the United States of America, at 71, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (January 1980).

²⁷²*Id.* at 71 n.3, 72 n.2 (citing arts. 1, 55, & 56 of the United Nations Charter, along with arts. 3,5,7,9,12, & 13 of the Universal Declaration of Human Rights, and arts. 7,9,10, & 12 of the Covenant on Civil and Political Rights for the proposition that international law protects fundamental rights such as the right to life, liberty, and the security of person; the prohibition on torture, cruel, inhuman, or degrading treatment; the right to equality before the law; the prohibition on arbitrary arrest and detention; and the right to freedom of movement as justifying criminal sanctions).

²⁷³International Law Commission, 31 U.N. GAOR, Supp. No. 10, at 226 (1976), *cited in* 2 Y.B. INT'L L. Comm'n 95 (1976).

before the Convention was signed."²⁷⁴ The International Court of Justice noted in dicta that the provisions of Article 3 embody "elementary considerations of humanity."²⁷⁵ In another opinion, the International Court of Justice solidified the status of Article 3 protections as customary law by describing them as a "minimum yardstick, in addition to the more elaborate rules to be applied to international armed conflicts."²⁷⁶

Recent developments have reinforced the status of Common Article 3 as customary international law. In the context of an internal armed conflict in Rwanda, the Independent Commission of Experts concluded that Common Article 3 supports the

²⁷⁴COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (Pictet ed., 1958) [hereinafter Pictet].

²⁷⁵Corfu Channel (Assessment of the Amount of Compensation Due from the People's Republic of Albania), Merits, 1949 I.C.J. 237 (November 1949).

²⁷⁶Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 4, 114 ¶ 218 (June 27, 1986). See also Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), Merits, 1970 I.C.J. 4, 32 (February 5, 1970) (distinguishing diplomatic protections available only to nationals of a protecting state from protection of "basic rights of the human person" which "all states can be held to have a legal interest" in protecting, and noting the difference between the "obligations of a state towards the international community as a whole" and those obligations arising among individual states).

principle of individual criminal liability.²⁷⁷ As a result, the Statute for the International Tribunal for Rwanda conveyed prosecutorial power over violations and threatened violations of Common Article 3.²⁷⁸ Arguing for the Statute of the International Tribunal for the Former Yugoslavia, the representatives of the United States, United Kingdom, and France all asserted that violations of Common Article 3 are punishable as international crimes.²⁷⁹ The Joint Chiefs of

²⁷⁷*Interim Report Dated October 1, 1994 of The Commission of Experts Established Pursuant to Security Council Resolution 935, U.N. Doc. S/1994/1125, annex, ¶¶ 125-28.*

²⁷⁸Rwanda Statute, *supra* note 105, art. 4. Article 4 of the Rwanda prohibits "serious violations of Article 3 common to the Geneva Conventions" including, but not limited to the following:

- (a) Violence to life, health and physical or mental well being of persons, in particular murder, as well as cruel treatment such as torture, mutilation, or any form of corporal punishment,
- (b) Collective punishments,
- (c) Taking of Hostages,
- (d) Acts of terrorism,
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault,
- (f) Pillage,
- (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,
- (h) Threats to commit any of the foregoing acts.

²⁷⁹Amicus Curiae Brief Presented by the Government of the United States of America, 25 July 1995, IT-94-I-T, at 37, quoting Provisional Verbatim Record of the Three Thousand Two Hundred

Staff and American Bar Association also recognize that the customary international law character of Common Article 3 supports international criminal prosecution.²⁸⁰

The description of Article 3 prohibitions as continuum crimes is apt because the acts are criminal during internal armed conflicts, and remain so throughout the spectrum of conflict. There have been national trials for individuals charged with violations similar to common Article 3.²⁸¹

Paraphrasing Pictet, what criminal could argue that torture, murder, mutilation, summary executions, or other acts which violate Common Article 3 are valid tools for human relations?²⁸²

and Seventeenth Meeting, U.N. Doc. S/PV.3217, at 15 (1993) [hereinafter Tadic Brief].

²⁸⁰Meron, *supra* note 40, at 560-61.

²⁸¹Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNATL L. 1 (1978). On September 28, 1995, for example, a court in Zadar County, Croatia sentenced Miljenko Jasika to ten years confinement for the criminal act of war crime against civilians. From 1992 to 1994, Jasika organized terrorist activities in the Banja Luka area, maltreated Muslims, planted explosive devices, and threw bombs into the homes of Croats and Muslims. *British Broadcasting Corporation, BBC Summary of World Broadcasts*, EE/D2422/A (HINA News Agency, Zagreb, Croatia, Sept. 28, 1995) (on file with the author). In March 1993, a Bosnian military court sentenced two Serb militiamen to death by firing squad for war crimes against Muslims. One defendant, Borislav Herak, confessed to 35 murders and 16 rapes. *Two Charged in War Crimes Trial*, CHI. DAILY L. BULL., Mar. 12, 1993, at 1.

²⁸²Pictet, *supra* note 274, at 36. See also Meron, *supra* note 40, at 566 ("no person who has committed such acts, in Rwanda,

Therefore, "common Article 3 is beyond doubt part of customary international law,"²⁸³ and as such supports criminal prosecutions for violations of its protections.

2. *Crimes Against Humanity*--The pattern of international agreements, customs, and judicial precedent fits together to proscribe crimes against humanity. The rubric "crimes against humanity" describes a range of offenses closely related, yet distinct from Common Article 3. International law defines crimes against humanity as acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, or religious grounds, and other inhumane acts.²⁸⁴ Common Article 3 and Crimes Against

or elsewhere, could claim in good faith the he/she did not understand that the acts were prohibited. And the principle *nullem crimen* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed").

²⁸³Decision on the Defence Motion, Jurisdiction of the Tribunal, 10 August 1995, IT Case No. IT-94-1-T, ¶ 72. The Trial Chamber's decision implicitly strengthens the recognition of Common Article 3 as a continuum crime. In the language of the Trial Chamber, the term "laws or customs of war" applies to international and internal armed conflicts, and the minimum standards of Common Article 3 support criminal prosecutions which do not violate the principle of *nullem crimen sine lege*. *Id.* ¶ 74.

²⁸⁴Statute of the International Tribunal, *supra* note 172, art. 5; Rwanda Statute, *supra* note 102, art. 3.

Humanity therefore encompass the same kind of acts which violate "the elementary considerations of humanity."²⁸⁵

Because crimes against humanity violate such basic human rights, they govern conduct during all armed conflicts, whether internal or international.²⁸⁶ The London Charter recognized crimes against humanity as a class of offenses distinct from war crimes.²⁸⁷ The Statute of the International Tribunal for

²⁸⁵*Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, ¶¶ 73, 82 (1994).* From November 1992 until April 1994, the Commission of Experts gathered information with a view towards providing the Secretary General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of customary international law committed in the territory of the Former Yugoslavia. The 3,000 page report documents large scale and brutal violations of international humanitarian law as well as grave breaches of the Geneva Conventions.

²⁸⁶*Id.* ¶ 75.

²⁸⁷*Id.* ¶ 74. The London Charter, *supra* note 12, art 6(c), defined crimes against humanity as crimes including "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal." The Nuremberg Tribunal recognized the legality of the substantive offenses, but found that the Charter limitation prevented its making a general declaration that the acts prior to 1939 were Crimes against Humanity. 1 I.M.T. *supra* note 2, at 254 ("The Tribunal is of the opinion that revolting and horrible as those crimes were, it has not been satisfactorily proved that they were done in the execution of, or in connection with, any such crime [within the jurisdiction of the Tribunal]."). Allied Control Council Law No. 10 later deleted the requirement for a linkage between crimes against humanity and other crimes. See Egon

the Former Yugoslavia establishes jurisdiction over crimes against humanity "committed in armed conflicts, whether international or internal in character."²⁸⁸ The Rwanda Statute likewise allows jurisdiction over crimes against humanity without restricting the offenses to international armed conflicts.²⁸⁹ Describing the evolution of the law, one scholar noted that crimes against humanity are autonomous offenses, and that "crimes against humanity may be committed in time of war or in time of peace; war crimes can be committed only in time of war."²⁹⁰

In this vein, the International Law Commission recognized crimes against humanity as a separate crime defined by general international law.²⁹¹ Therefore, crimes against humanity is a

Schwebel, *Crimes Against Humanity*, 23 B.Y.B. INT'L L. 178, 218 (1946) ("it is not necessary for an act to come under the notion of crime against humanity within the meaning of Law No. 10 to prove that it was committed in execution of, or in connection with, a crime against peace or a war crime").

²⁸⁸ Statute of the International Tribunal, *supra* note 172, art. 5

²⁸⁹ Rwanda Statute, *supra* note 105, art. 3.

²⁹⁰ Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, [1989] 2 Y.B. OF THE I.L.C. 86, U.N. Doc. A/N/CN.4/SER.A/1989/Add.1, at 87.

²⁹¹ James Crawford, *Current Development: The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404, 410 (1995) (noting that Article 20 of the 1994 Statute confers jurisdiction over four offenses defined by general international law: (a) the crime of genocide, (b) the crime of aggression, (c) serious violations of the laws and customs applicable in armed conflict, and (d) crimes against humanity).

"self contained category" which proscribes conduct during any type of armed conflict "without the need for any formal link with war crimes."²⁹²

Given that crimes against humanity infringe on fundamental human rights, anyone can be a victim. While the basic protections of Article 3 protect all persons at all times, international custom limits crimes against humanity to large-scale crimes against the civilian population. The Rwanda Statute, for example, authorizes punishment of crimes against humanity when "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds."²⁹³ By definition, then, "[t]he hallmark of such crimes [crimes against humanity] lies in their large-scale and systematic nature. The particular forms of unlawful act are less crucial to the definition tha[n] the factors of scale and deliberate policy, as well as in their being targeted against the civilian population."²⁹⁴

²⁹²1 OPPENHEIM'S INTERNATIONAL LAW 996 (Robert Y. Jennings & Arthur Watts eds., 1992).

²⁹³Rwanda Statute, *supra* note 105, art. 3. See also Statute of the International Tribunal, *supra* note 172, art. 5; Report of the Secretary General, *supra* note 172, ¶ 48.

²⁹⁴Report of the International Law Commission on the work of its forty-sixth session, U.N. GAOR, 49th Sess., Supp. No. 10, at 76, U.N. Doc. A/49/10 (1994). The International Law Commission explained Article 20 of the Draft Statute for an International Criminal Court using the quoted language. The Report defines the term "directed against any civilian population by repeating

The distinction between human rights violations and crimes against humanity is one of degree and not of effect.

Crimes against humanity is a continuum crime because the class of offenses are criminal during peacetime, and retain that character throughout both internal and international armed conflicts.²⁹⁵ Crimes against humanity demonstrates the need to define continuum crimes because of the haphazard intersection of international criminal laws. For example, widespread slaughter of citizens for political purposes is a crime against humanity, but would not violate the Genocide Convention.²⁹⁶ On the other hand, torturing a few armed combatants would violate

the exact same language from Article 3 of the Rwanda Statute, *supra* note 105 and accompanying text.

²⁹⁵Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 85 (1995) Many human rights conventions render certain types of behavior between citizens of the same state as international crimes whether committed in peace or war. The "tangled meshing" of crimes against humanity and human rights "militates against requiring a link with war for the former. The better opinion today ... is that crimes against humanity exist independently of war." *Id.*

²⁹⁶Political groups are conspicuously absent from the list of protected groups under the Genocide Convention. Some states feared that including political groups under the Convention would create an unnecessary obstacle to ratification of the instrument. *Webb, supra* note 148, at 391. Thus, the fact that the Convention does not prohibit the widespread killing of political foes does not lead to the conclusion that such killings do not violate international law. Defining genocide as a continuum crime would close the loophole left by the Genocide Convention.

their rights under Common Article 3, but would not constitute crimes against humanity.

The international law of human rights operates alongside humanitarian laws of war to establish jurisdiction over conduct proscribed as criminal. The transition from peace to war is one landmark to help lawyers apply the right set of law to criminal acts. However, on both sides of the divide, the definitions of various treaties limit the scope of criminal jurisdiction. "Black letter" treaty rights clash with customary international law to create overlapping, and often confusing applications. Section V will harmonize the various strands of legal authority for prosecuting international crimes. United States military forums can prosecute foreign nationals whose criminal conduct threatens the achievement of mission objectives. Section V will articulate a coherent class of continuum crimes which warrant United States jurisdiction over foreign nationals.

V. The Substantive Scope of Expanded Jurisdiction

The class of continuum crimes is the logical application of the principle of *omne majus continet in se minus*, or "the greater always contains the less."²⁹⁷ Continuum crimes defines the class of fundamental human rights which precede armed

²⁹⁷BLACK'S LAW DICTIONARY, 1086 (6th ed. 1990).

conflicts and protect persons throughout the spectrum of conflicts. It is incorrect to maintain that all human rights guarantees "apply always and everywhere."²⁹⁸ Human rights law describes an array of pedantic protections the loss of which would be regrettable, but not devastating to the victim.²⁹⁹

²⁹⁸*Inadequate Reach of Humanitarian Law*, *supra* note 43, at 594. The court in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), implicitly recognized torture as one of the *jus cogens* norms subject to international jurisdiction. The opinion does not use the term *jus cogens*, but states that "Among the rights universally proclaimed by all nations ... is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become -like the pirate and the slave trader before him- *hostis humani generis*, an enemy of all mankind." *Id.* at 890. *Accord* *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 865 (D.C.N.Y. 1984) ("it is essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture"). *See also* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996) (Analyzing the status of torture as a violation of customary international law and upholding a civil suit against the leader of the Bosnian Serbs under the authority of the Torture Victim Protection Act of 1991).

²⁹⁹Louis B. Sohn, *The New International Law: Protecting the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 9-12 (1982) (describing the instruments comprising the International Bill of Human Rights, as well as some fifty other instruments, declarations, and conventions on specific human rights and humanitarian issues). One example is the freedom of assembly enshrined in Article 20 of the Universal Declaration, *supra* note 192, and Article 21 of the Civil and Political Covenant, International Covenant on Civil and Political Rights, G.A. Res. 2200A, December 16, 1966, 21 GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976 [hereinafter Civil and Political Covenant].

Armed conflict modifies most human rights protections, and may suspend some rights altogether.³⁰⁰

In sharp contrast, continuum crimes embody "certain overriding principles of international law" which cut across the spectrum of armed conflicts.³⁰¹ During armed conflicts the weight of international law bans slavery, murder, prolonged arbitrary detentions, torture, and other systematic crimes against noncombatants. Many multilateral treaty provisions and domestic constitutional provisions echo international condemnation of those same practices.

The world also condemns genocide and torture, or other cruel, degrading, and inhuman treatment by criminalizing those offenses domestically and in dedicated conventions.³⁰² These crimes are more than mere legal abstractions because violations of *jus cogens* rights destroy the foundational rights of human beings. Real victims suffer when criminals commit murder,

³⁰⁰Dinstein, *supra* note 263, at 357.

³⁰¹IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 513 (3d ed. 1979) According to Brownlie, the major distinguishing feature of *jus cogens* norms such as those I call continuum crimes is their "relative indelibility. They are rules which cannot be set aside by treaty or acquiescence." *Id.*

³⁰²See *supra* notes 144-69 and accompanying text, and notes 191-208 and accompanying text for descriptions of the legal basis for punishing genocide and torture, or other cruel, inhumane, or degrading treatment or punishment respectively.

torture, unlawful detentions of innocent people, and other heinous crimes.³⁰³

Phrased another way, continuum crimes represent the class of *jus cogens* norms which are "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."³⁰⁴ Recognizing that continuum crimes embody *jus cogens* norms has several important results.

In the context of armed conflicts, the most striking aspect of *jus cogens* norms is that states cannot consent to any treaty provisions which violate those norms.³⁰⁵ The codified

³⁰³*Human Rights and the Phenomenon of Disappearances: Hearings Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 79 (1979) (testimony by a representative of Amnesty International); Forti v. Suarez-Mason, 694 F. Supp. 707, 710 (N.D. Cal. 1988) (disappearances and state condoned killings violate rights under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, and The American Convention on Human Rights, thereby violating customary international law).*

³⁰⁴Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331, art. 52 (1969), reprinted in 63 I.L.M. 875 (1969) [hereinafter Vienna Convention on the Law of Treaties] (articles 64, 66, and 71 all deal with the definition and application of *jus cogens* norms to the conduct of relations between nations). See also RESTATEMENT, *supra* note 12, § 102.

³⁰⁵Vienna Convention on the Law of Treaties, *supra* note 304, art. 53.

laws of war build on the foundation of *jus cogens* norms, but do not eliminate or nullify their effect. International treaties may establish specific legal rights applicable to defined circumstances, but states cannot ever contract away their *jus cogens* obligations.

For example, the Geneva Convention Relative to the Treatment of Prisoners of War establishes a special set of rights and duties pertaining to a select class of persons in a limited setting. The law modifies the prisoner's rights to freedom, but does not extinguish the prisoner's preexisting *jus cogens* right to live. No treaty provision could permit a detaining power to murder prisoners in its care. Without referring to *jus cogens* norms, the International Court of Justice has left no doubt that the international liberty of contract does not allow states to violate basic civilizing and humanitarian "high purposes."³⁰⁶ *Jus cogens* norms thus dictate that states depart from the absolute sovereign-state model.

³⁰⁶Craig Scott et. al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning The Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo On Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 24 (1994). The cited text refers to the International Court of Justice opinions in the Barcelona Traction case and the Reservations to the Convention on Genocide Case for the proposition that self determination and genocide are *jus cogens* norms. See also Erik Suy, *The Concept of Jus Cogens in Public International Law*, in GEORGE ABI-SAAB, *INTRODUCTION TO THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW: PAPER AND PROCEEDINGS* 17, 60 (1967) [hereinafter Suy].

Similarly, continuum crimes "prevail over and invalidate other rules of international law in conflict with them."³⁰⁷

Because continuum crimes protect individual rights of a universal and general nature, they impose obligations on the entire international community.³⁰⁸ All states must comply with the *jus cogens* provisions of the 1969 Vienna Convention on the Law of Treaties. One scholar described *jus cogens* norms as "rules which, while embodied in a treaty, [are] still valid as customary rules for States not bound by the treaty, and hence for states in general."³⁰⁹ States must respect *jus cogens* norms without regard for territorial restrictions imposed by broader human rights instruments.³¹⁰

³⁰⁷RESTATEMENT, *supra* note 12, § 102 cmt. k.

³⁰⁸Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 436 (1989).

³⁰⁹Suy, *supra* note 306, at 53.

³¹⁰For example, Article 2, para. 1 of the Civil and Political Covenant, *supra* note 299, obligates states party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Present Convention ..." Some scholars conclude that this language would allow states to avoid application of the Convention outside their territory. Dietrich Schindler, *Human Rights and Humanitarian Law*, 31 AM. U.L. REV. 935, 939 (1982). Other scholars debate Schindler's position, but all agree that the fundamental obligations of *jus cogens* norms apply to all states even when they seek policy objectives outside their boundaries. See *Inadequate Reach of Humanitarian Law*, *supra* note 43, at 595; *Extraterritoriality of Human Rights Treaties*, *supra* note 7; Thomas Buergenthal, *To Respect and To Ensure: State Obligations and Permissible Derogations*, in THE

Finally, the status of continuum crimes as *jus cogens* norms permits universal jurisdiction over those offenses. All states can demand and enforce compliance with *jus cogens* norms because of their fundamental importance. By definition, *jus cogens* norms exist "in the higher needs of the international community" as opposed to serving the policy goals of individual states.³¹¹

Universal jurisdiction to enforce *jus cogens* norms arises because widespread violations are "a great danger to the international community as a whole and to the effectiveness of international law in international relations."³¹² Cherif Bassiouni described the indirect enforcement of international crimes by domestic forums as "the essence of international

INTERNATIONAL BILL OF HUMAN RIGHTS 72, 74-77 (L. Henkin ed., 1981). In the context of a case regarding United States obligations under the Refugee Convention, the Supreme Court wrote that "a treaty cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent." *Sales v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549, 2565 (1993). United States law thus appears to recognize the distinction between ordinary human rights obligations and the select class of actions which violate peremptory norms, and which thereby constitute *jus cogens* human rights.

³¹¹Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966).

³¹²B.S. Murty, *Jus Cogens in International Law*, in GEORGE ABI-SAAB, INTRODUCTION TO THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW: PAPER AND PROCEEDINGS 79, 111 (1967); RESTATEMENT, *supra* note 12, § 404.

criminal law."³¹³ United States forums have jurisdiction over continuum crimes because they are universal jurisdiction offenses, but that jurisdiction only has practical value if accompanied by the statutory basis for real prosecution of real criminals.³¹⁴

To clarify, continuum crimes include the following international offenses: genocide, slavery or engaging in the slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination. These crimes all violate fundamental human rights guarantees which protect persons in time of peace or war. Crimes against humanity is another continuum crime which overlaps to some extent with the above list.³¹⁵

³¹³*Interstate Cooperation in Criminal Matters*, *supra* note 11, at 298.

³¹⁴International prosecution of international crimes is the exception, and prosecution in national courts is the rule. The most effective, frequent enforcement of international criminal law has been in national courts when national judges apply international criminal law or use national criminal statutes which codify international rules in a domestic context. Bert V.A. Roling, *Aspects of the Criminal Responsibility For Violations of the Laws of War*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 199, 201 (Antonio Cassese ed., 1979).

³¹⁵Some courts have expanded the concept of crimes against humanity to include egregious violations of human rights, such as torture, summary executions, and disappearances. See, e.g.,

Finally, the crime of attacking United Nations personnel is a unique continuum crime. Attacks against any noncombatants are universal jurisdiction offenses which violate the fundamental rights of the victim. United Nations personnel deployed on noncombat missions are merely a special group of noncombatants. United Nations personnel may even be entitled to greater protection due to their status as representatives of the international community. As a logical corollary, the continuum crime of attacking United Nations personnel ceases to apply when the United Nations personnel participate in international armed conflicts. Because the class of continuum crimes applies across the spectrum of armed conflict, guilty criminals cannot escape punishment simply by claiming that a given conflict did not rise to the level of an international armed conflict.

The grouping of continuum crimes does not represent any new statement of international criminal law. For almost twenty years, scholars have sought to define the "irreducible core of humanitarian norms and human rights that must be respected in all situations and at all times."³¹⁶ International law

Velasquez Rodriguez Case, Inter-Am. Ct. H.R. 35, OAS/ser.L/V/III.19, doc. 13, app. VI PP149-58 (1988).

³¹⁶*Eide et al., supra* note 43, at 216 (describing the history and composition of the Declaration of Minimum Humanitarian Standards which is designed to be a "safety net" below which no victim should fall). As early as 1975, the President of the

proscribes the class of actions I call continuum crimes because they all outrage the conscience of civilized nations.³¹⁷

However, the maze of overlapping laws and treaty rights creates confusion which causes lawyers to debate, legislatures to deliberate, and scholars to equivocate. In the meantime,

Swiss Red Cross proposed a declaration which would set out "in condensed form the fundamental rules of humanitarian law, and rendering the lofty ideas underlying humanitarian law clearly discernible and easily understandable." *Inadequate Reach of Humanitarian Law*, *supra* note 43, at 604.

³¹⁷See M. Cherif Bassiouni, *The Proscribing Function of International Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 1949 (1982). There are actually two competing schools of thought on the content of *jus cogens* norms. A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 32-38. The concept of *jus cogens* norms developed prior to the Vienna Convention, and some scholars view the content of *jus cogens* norms as being driven by the object of the norm. JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* 97-98, 103-105 (1974). This approach might be termed the natural law viewpoint. According to the natural law frame of reference, all other sources of law recognized by the International Court of Justice must "be subject to the rules of international law concerning *jus cogens*." Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273, 281-82 (1974-5). On the other hand, the clear language of Article 53 of the Vienna Convention makes the status of *jus cogens* norms dependent on acceptance by states. This might be termed the positive law approach. Applying either methodology, my list of continuum crimes constitutes *jus cogens* norms which generate universal jurisdiction. While the class of continuum crimes protects very basic, core human rights, they are all also defined and proscribed by a number of international instruments.

criminals perpetrate deliberate and widespread continuum crimes and remain unpunished.³¹⁸

In the words of the Israeli Supreme Court, international jurisdiction exists over offenses which "shake the international community to its very foundations."³¹⁹ Even though the United States has universal jurisdiction over the class of continuum crimes, enforcement depends on clear

³¹⁸For a fascinating discussion of the efforts some governments have made to punish perpetrators see Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451 (1990). See also Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U.J. INT'L L. & POL'Y 499 (1994); Louis Gentile, *Terror Seems Uncannily Normal*, N.Y. TIMES, Jan. 14, 1994, at A14 (Canadian diplomat with the High Commissioner for Refugees lamenting the lack of effective protection, adding "[t]he so-called leaders of the Western world have known what is happening here for the last year and a half. They receive play by play reports. They talk of prosecuting war criminals, but do nothing to stop the crimes. May God forgive them. May God forgive us all."); M. Cherif Bassiouni, "Crimes Against Humanity": *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 492 (1994) ("present passivity ... tragic inaction of the world's major powers, who have failed to prevent or stop these events").

³¹⁹Attorney General of Israel v. Eichmann, Israel Supreme Ct. (1962), 36 Int'l L. Rep. 277 (1968), reprinted in II THE LAW OF WAR: A DOCUMENTARY HISTORY 1627, 1673 (Leon Friedman ed., 1972). In this famous case, Israel exercised universal jurisdiction over Adolf Eichmann. Israeli agents abducted Eichmann in Argentina and returned him to Jerusalem for trial for crimes against humanity. Israel did not even exist at the time the crimes occurred, and this case shows that neutral states can prosecute grave breaches of the Geneva Conventions case.

domestic legislation.³²⁰ The phrase continuum crimes is a figurative toolbox to collect and organize the category of offenses which allow United States courts to punish foreign nationals. By analogy, United States prosecutors do not have an organized framework for punishing international criminals.

³²⁰RICHARD B. LILLICH, INVOKING INTERNATIONAL LAW IN DOMESTIC COURTS (1985). See also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-16, cert. denied 113 S.Ct. 1812 (1993) (acts of torture were violations of *jus cogens* and customary international law, although the provisions of the Foreign Sovereign Immunities Acts still apply). In the Eichmann case, *supra* note 319, Israel applied a domestic statute criminalizing crimes against humanity "done during the period of the Nazi regime in an enemy country." Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, in JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 359-379 (1990).

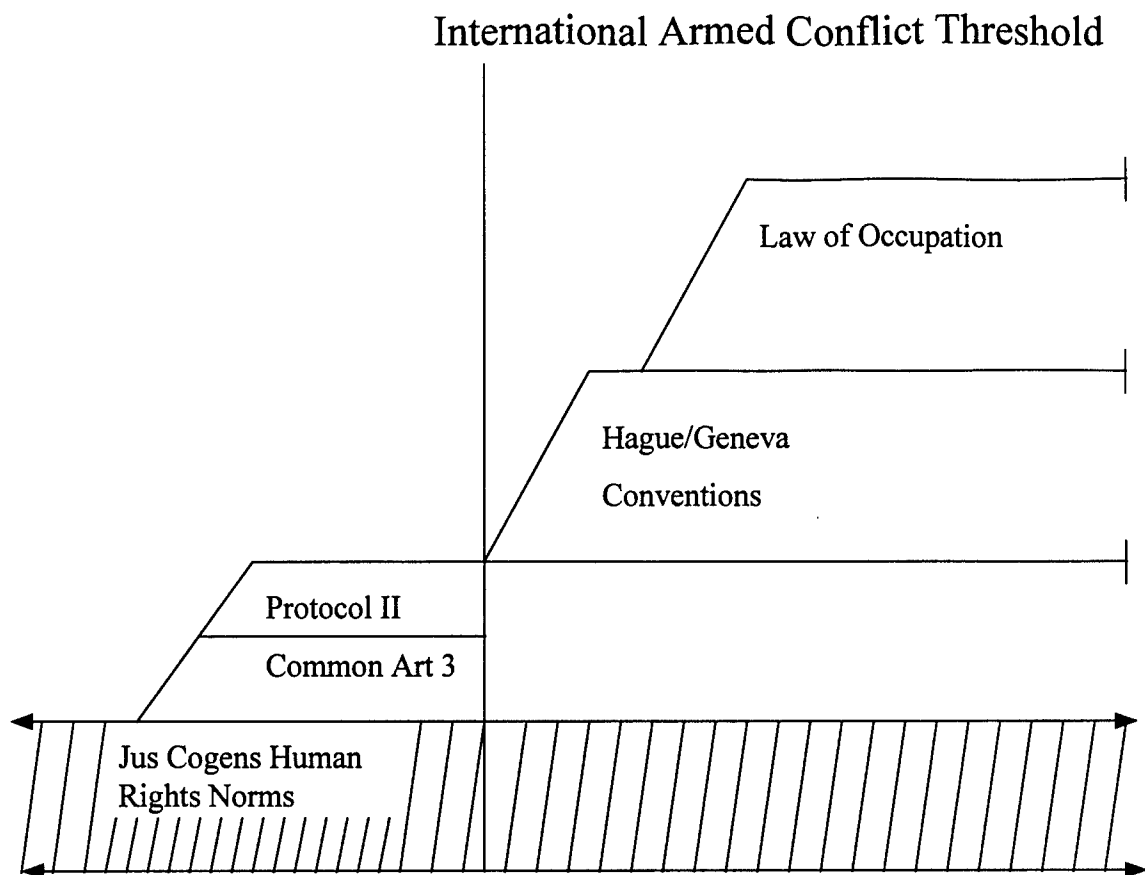


Figure 2

Figure 2 illustrates the relationship between the *jus cogens* offenses I term continuum crimes and the established laws of war.

As described above, continuum crimes encompass the most basic and powerful human rights. Continuum crimes have a greater magnitude than the laws of war in the sense that they define crimes which exist prior to and independent of the state of armed conflict. The *jus cogens* offenses I term continuum

crimes operate "as a concept superior to both customary international law and treaty [law]." ³²¹

As figure 2 illustrates, the character of continuum crimes remains constant as the armed conflict escalates. Due to their *jus cogens* status, no provision of international law replaces the body of continuum crimes. The continuity of continuum crimes is consistent with Telford Taylor's observation that war consists largely of acts that would be criminal if performed in time of peace.³²² Armed conflict lays a blanket of immunity over combatants only insofar as they comply with the laws of war.³²³

³²¹Case Concerning Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosnia-Herzegovina v. Yugo., Serbia, and Montenegro), Further Requests for the Indication of Provisional Measures, 1993 I.C.J. 325 (Sept. 13, 1993) (Separate Opinion of Judge Lauterpacht), ¶ 100. See generally RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 766-864 (2d ed. 1991) (describing the various human rights instruments as they relate to the established humanitarian laws of war); RESTATEMENT, *supra* note 12, § 102 (international agreements which violate *jus cogens* norms are void, thereby showing that *jus cogens* norms sit atop the hierarchy of international law).

³²²TELFORD TAYLOR, NUREMBERG AND VIETNAM 19-20 (1970) [hereinafter Taylor].

³²³For a discussion of the legal consequences of the state of "war" in modern international law, see generally YORAM DINSTEIN, WAR, AGGRESSION, AND SELF DEFENSE 140-161 (1988) (concluding that even when the United Nations Security Council deems armed action by a state to be unlawful aggression, individual soldiers on either side who kill enemy soldiers are immunized from criminal prosecution so long as they obey the laws of war).

The concept of continuum crimes recognizes that the acts prohibited by the laws of war retain the criminal character that it would have had during a state of peace.³²⁴ Since the laws of war create a defined body of different rights and obligations, protected persons enjoy a duality of rights.³²⁵ This duality means that an act may constitute a continuum crime as well as violating a specific provision of the laws of war. The laws of war do not replace continuum crimes even though both bodies of law may proscribe the same conduct in some cases. United States forums retain independent jurisdiction over continuum crimes, in addition to that arising from the laws of war.

Building from the baseline of continuum crimes, Common Article 3 protections apply to conflicts "not of an international character."³²⁶ The protections of Common Article 3 resemble those of the continuum crimes because they apply at the lower edge of the zone between war and peace. Importantly, Common Article 3 ensures humane treatment for all persons engaged in internal conflicts regardless of nationality.³²⁷ The

³²⁴Taylor, *supra* note 322, at 19-20.

³²⁵Dinstein, *supra* note 263, at 357.

³²⁶Civilians Convention, *supra* note 4, art. 3; Convention on Prisoners of War, *id.*; Convention on Sick and Wounded, *id.*; Convention on Sick and Wounded at Sea, *id.*

core body of *jus cogens* norms remains constant even though Common Article 3 conveys additional legal rights to all persons affected by the armed conflict.³²⁸

Protocol II establishes a legal regime with a more limited application than Common Article 3.³²⁹ Protocol II develops and expands the succinct guarantees of Common Article 3.³³⁰ From

³²⁷G.I.A.D. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflicts*, 1 ISR. Y.B. INT'L L. 191, 202 (1971) [hereinafter Draper].

³²⁸See Theodor Meron, *Towards a Humanitarian Declaration on Internal Strife*, 78 AM. J. INT'L L. 859, 865-66 (1984); Hernan Montealegre, *The Compatibility of a State Party's Derogation Under Human Rights Conventions with Its Obligations Under Protocol II and Common Article 3*, 33 AM. U.L. REV. 41, 44 (1983); Waldemar A. Solf, *Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict*, 13 GA. J. INT'L & COMP. L. 291 (1983).

³²⁹Although its character as customary international law is open to debate, Protocol II applies to "all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Protocol II, *supra* note 4, art. 1, para. 1.

³³⁰Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U.L. REV. 29, 34 (1983). In the context of considering the relationship between Common Article 3, Protocol II, and the class of continuum crimes, it is important to note that Protocol II itself merely "develops and supplements Article 3 common to the Geneva Conventions of 1949 without modifying its existing conditions of application." Protocol II, *supra* note 4, art. 1.

the human rights perspective, Protocol II embodies the "hard core" guarantees of the 1966 International Covenant on Civil and Political Rights.³³¹ Common Article 3 and Protocol II produce overlapping zones of rights which complement, but do not displace, preexisting continuum crimes. Thus, for example, any deliberate killing of a noncombatant in the course of a non-international armed conflict is punishable as murder under several different legal regimes.³³²

As figure 2 shows, the transition from internal to international armed conflict initiates the binding effect of the full body of the laws of war. The legal divide is sharp,³³³ but the reality of modern operations can produce ambiguity as to whether the laws of war actually apply.³³⁴ Some scholars

³³¹*Id.* See also Antonio Cassese, *A Tentative Appraisal of the Old and New Humanitarian Law of Armed Conflict*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 461-501 (Antonio Cassese ed., 1979).

³³²*Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts*, S. TREATY DOC. 2, 100th Cong., 1st Sess. III, IV (1987), reprinted in RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 822-824 (2d ed. 1991).

³³³See III COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (J. Pictet ed., 1960) ("Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of article 2, even if one of the Parties denies the existence of a state of war.").

³³⁴Parkerson, *supra* note 9, at 35-46 (discussing the difficulty of applying humanitarian law standards to operations that

argue for broad application of the Geneva/Hague rules on the basis that the law governing the conduct of warfare is more than an abstract set of rules to permit the game of "war" between states.³³⁵

Despite their humanitarian component, the laws of war originated in the tension between military necessity and expedient restraints on the conduct of hostilities.³³⁶ The laws of war do not apply in time of peace because there is no

possess many of the characteristics of both international and internal armed conflicts). Professor Levy commented that the lack of a method for determining the automatic application of the laws of war to a particular situation is "one of the major inadequacies of the present law of armed conflict." HOWARD S. LEVY, WHEN BATTLE RAGES, HOW CAN LAW PROTECT? 6 (John Carey ed., 1971). See also Francoise J. Hampson, *Human Rights Law and International Humanitarian Law: Two Sides of the Same Coin?* 46, 50-51, in UNITED NATIONS CENTRE FOR HUMAN RIGHTS, BULLETIN OF HUMAN RIGHTS 91/1 (1992).

³³⁵Richard R. Baxter, *The Role of Law in Modern War*, 1953 AM. SOC'Y INT'L L. PROC. 90, 95-98 ("No more can we allow abstract considerations about the changing nature of hostilities to blind us to the fact that the use of force, whether called war or enforcement action, causes suffering to human beings, and that it is human suffering which the law of war attempts to mitigate."). See also Joseph Kunz, *The Laws of War*, 50 AM. J. INT'L L. 313 (1956); FRITZ GROB, *THE RELATIVITY OF WAR AND PEACE* (1949).

³³⁶*Inadequate Reach of Humanitarian Law*, *supra* note 43, at 592. See also Draper, *supra* note 327, at 199-201; G. BEST, *HUMANITY IN WARFARE* 157-215 (1980); PAUL CHRISTOPHER, *THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES* 165-188 (1994).

military necessity.³³⁷ The laws of war also contain express exceptions on the basis of military necessity.³³⁸

Figure 2 shows that the developed laws of war do not preempt the body of continuum crimes. The perception that the laws of war create a comprehensive, seamless band of protections is false. The laws of war produce a patchwork of protections based on nationality, location, and the exigencies of military operations. As military necessity wanes, the laws

³³⁷Speaking to an audience at the Fordham School of Law, the United States Ambassador to the United Nations made this point quite well, albeit indirectly:

I need not recount the suffering that has been visited upon the people of the regions for which these tribunals were created [Rwanda and the Former Yugoslavia]. The images are seared in our brains. This is not "heat of battle" violence, and the victims were not in the terminology of the soldier collateral damage. The victims were men and women, boys and girls, targeted intentionally not because of what they had done, but for who they were."

Ambassador Madeleine K. Albright, *International Law Approaches The Twenty-First Century: A U.S. Perspective on Enforcement*, 18 FORDHAM INT'L L.J. 1595, 1603 (1995).

³³⁸See, e.g., FM 27-10, *supra* note 4, para. 43(c) (requiring warnings to the civilian population before assaults "when the situation permits"); Protocol I, *supra* note 4, art. 57(2)(c) ("effective warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."). The Geneva Conventions weigh military necessity against operational requirements before according special status to various groups of "protected persons." For this reason, there cannot be a defense of military necessity for violating the rights of "protected persons".

of war specify greater rights for protected persons along with greater obligations for states. For example, the law of occupation is a subset of the laws of war which provides very detailed rights and obligations. Even the detailed law of occupation does not preempt the application of *jus cogens* norms contained in continuum crimes.³³⁹

The laws of war enshrine a positivist approach towards regulating armed conflicts. As a result, all of the Geneva Conventions provide that parties may not conclude special agreements which detract from the rights enjoyed by protected parties.³⁴⁰ By extension, the laws of war contain clear authority to prosecute violations. The Conventions require states either to hand over offenders on request by other States, or prosecute grave breaches regardless of the location of the crime or the nationality of the offender.³⁴¹

³³⁹Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT'L L. 542 (1978).

³⁴⁰Civilians Convention, *supra* note 4, art. 7; Convention on Prisoners of War, *id.*, art. 6; Convention on Sick and Wounded, *id.*, art. 6; Convention on Sick and Wounded at Sea, *id.*, art. 6. Professor Dinstein wrote that this provision reflects the common sense proposition that protected persons are entitled to their human rights independently of state rights, and states may not therefore renounce rights which do not belong to them. Dinstein, *supra* note 263, at 357.

³⁴¹Based on the customary international law status of the laws of war, all states share the same obligations with regard to war crimes. The duties of all states under international law stem from the principle *aut dedere aut punire* (extradite or prosecute). See Civilians Convention, *supra* note 4, art. 146;

The Conventions also recognize the right of states to prosecute violations which do not constitute grave breaches. The law of war stipulates that states "shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the Grave breaches."³⁴² United States law implements the requirements of international law by providing a clear domestic jurisdictional basis for war crimes prosecutions.³⁴³ These provisions

Convention on Prisoners of War, *id.*, art. 129; Convention on Sick and Wounded, *id.*, art. 49; Convention on Sick and Wounded at Sea, *id.*, art. 50.

³⁴²Convention on Prisoners of War, *supra* note 4, art. 129.

Judge Roling noted that the distinction between grave and non-grave breaches could revolve around nothing more complicated than the distinction between the right to prosecute crimes and the obligation to prosecute or extradite grave breaches. B.V.A. Roling, *The Law of War and the National Jurisdiction Since 1945*, 100 RECUIL DES COURS 325, 342 (1960). Accord Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205 (1977) ("the system of grave breaches seems to assume that non-grave breaches are to be treated as war crimes for whose suppression States have a duty to take all necessary measures necessary, which measures are left to the state's discretion, and may include punitive prosecutions, disciplinary, or other administrative sanctions"). See also Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783 (1995).

³⁴³10 U.S.C. §§ 818, 821 (1995); 18 U.S.C. § 3231 (1995). At the conclusion of the Gulf War, President Bush affirmed the proposition that Saddam Hussein and other top Iraqi officials were responsible for numerous violations of international law: "And this I promise you. For all that Saddam has done to his own people, to the Kuwaitis and to the entire world, Saddam Hussein and those around him are accountable." President

coincidentally allow prosecutions of continuum crimes which occur in the context of international armed conflicts.

In contrast, criminals commit continuum crimes during operations other than war without fear of prosecution in a United States court. Current United States law does not provide a statutory basis for punishing extraterritorial continuum crimes. The legal basis for United States prosecution of continuum crimes is sound.³⁴⁴ The nature of universal jurisdiction is that international law permits United States domestic law to punish continuum crimes even without territorial, national, or other jurisdictional requirements.³⁴⁵

Bush's Address to the Joint Session of Congress, *reprinted in* WASH. POST, Mar. 7, 1991, at A32. President Bush later admitted regrets for not removing Saddam Hussein from power. Of course, prosecution and imprisonment for his crimes would have removed the Iraqi president. In an interview on the fifth anniversary of the war, President Bush admitted "I miscalculated. You don't cut off part of the snake, you kill the snake.... We blew it." Carrie Dowling, *Bush: "I Miscalculated" in Not Forcing out Saddam*, USA TODAY, Jan. 15, 1996, at A1.

³⁴⁴The full force of international law proscribes continuum crimes from every potential source. International law springs from four sources: international conventions; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of the various nations. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, ¶ 1, June 26, 1945, 59 Stat. 1031, T.I.A.S. No. 993, 3 Bevans 1153.

³⁴⁵Meron, *supra* note 40, at 570. The United Nations War Crimes Commission concluded that "a violation of the laws of war constitutes both an international and a national crime, and is therefore justiciable both in a national and international

Continuum crimes committed in the context of operations other than war are matters of international concern which affect American military and political objectives. With slight modifications to the UCMJ, United States military forums can exercise jurisdiction over foreign nationals who commit continuum crimes.

Congress should establish a domestic basis for prosecuting continuum crimes during operations other than war. Domestic legislation would bridge the gap between the theoretical basis for prosecuting continuum crimes and the operational reality of such prosecutions. Congress could allow domestic prosecutions of continuum crimes, but that does require the conclusion that deployed commanders should have the option of prosecuting foreign nationals.

In the abstract, there is no moral justification and no persuasive legal rationale for giving perpetrators of continuum crimes total freedom to commit grievous crimes without any fear of punishment.³⁴⁶ Part VI will describe the policy goals which warrant statutory changes to allow military commanders to prosecute continuum crimes in support of their mission. Exercising jurisdiction over continuum crimes would give

court." UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 232 (1948).

³⁴⁶Meron, *supra* note 40, at 561.

deployed commanders another tool to accomplish their military and political objectives.

VI. Expanded Jurisdiction As a Foreign Policy Tool

A. *Effective Enforcement of International Law*

Military tribunals are the only tool which deployed commanders can use to provide efficient criminal sanctions against perpetrators who commit continuum crimes. Given that human rights are the "foundation of freedom, justice and peace in the world,"³⁴⁷ human rights issues are a key concern of United States foreign policy.³⁴⁸ Promoting the increased observance of internationally recognized human rights is a "principal goal" of United States foreign policy.³⁴⁹

³⁴⁷Universal Declaration, *supra* note 192, preamble. In his first speech before the United Nations, President Clinton reminded that body that human rights are not something conditional, founded by culture, but rather something universal granted by God. The United States urged the creation of the United Nations High Commissioner for Human Rights. 6 DEP'T OF STATE DISPATCH 27 (September 27, 1993).

³⁴⁸See generally RICHARD B. LILlich, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 938-1053 (2d ed. 1991) (describing the role of human rights issues in the last three administrations and commenting on the political factors underlying policy choices with human rights implications).

³⁴⁹22 U.S.C. § 2304 (a)(1) (1995). The National Security Strategy of the United States seeks to enhance United States security through a dual strategy of "engagement and enlargement." THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF

Operations other than war intertwine human rights concerns with military operational issues. Of course, rights which are unenforceable resemble aspirations more than expectations. By contrast, military commanders cannot just "hope" to accomplish the mission. The art of command requires deft use of finite resources to achieve specified objectives. When the needs of the mission require prosecution of continuum criminals, the

ENGAGEMENT AND ENLARGEMENT (Feb. 1995). "Engagement" refers to selected uses of military and diplomatic power designed to "help resolve problems, reduce tensions and defuse conflicts before they become crises." *Id.* at 7. Figure 1 illustrates the range of operations encompassed by the term engagement. In contrast, the focus of "Enlargement" is to focus efforts towards increasing the number of democracies based on constitutional and free market principles. *Id.* at 22-25 ("Working with new democratic states to help preserve them as democracies committed to free markets and respect for human rights, is a key part of our national security strategy.").

For example, Congress allowed efforts to train foreign police forces in "internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian roles that support democracy." Foreign Operations, Export Financing, And Related Programs Appropriations Act, Fiscal Year 1996, Pub. L. No. 104-107, § 540A(d), 110 Stat. 704 (1996), *to be codified at* 22 U.S.C. § 2420. See also *Id.* § 508 (specifying that none of the funds appropriated by Congress shall be obligated to assist any country whose duly elected Head of Government is deposed by a military coup); *Id.* § 585(a)(2) (outlining criteria for assessing the potential for countries emerging from communism to join NATO and focusing on progress towards accepting democratic principles such as free market economies, civilian control of the military and police, adherence to the rule of law, and commitment to protecting the rights of all citizens and the territorial integrity of their neighbors).

commander may devote some assets to the apprehension and prosecution of criminals.³⁵⁰

There are several reasons why commanders may desire prompt prosecution of continuum crimes. For one thing, prosecutions are a tangible tool for assuring victims that justice is done. Aside from the deterrent effect, prosecuting continuum crimes decreases the motivation for victims to pursue personal vengeance against perpetrators. Atrocities which can "inflame mutual passions and engender a cycle of brutality, violence and reprisal," are one of the most serious obstacles to the restoration of peace.³⁵¹ Forestalling widespread retributions could, in turn, prevent an increasing spiral of violence which would threaten United States forces and undermine the goals of the operation.³⁵² Timely prosecutions could help contain the conflict.

³⁵⁰During the 1992 presidential campaign, President Clinton argued for military intervention in Bosnia to "restore some form of humanity." Barton Gellman, *U.S. Military Fears Balkan Intervention: Dual Combat, Relief Role Seen Unworkable*, WASH. POST, Aug. 12, 1992, at A24. Military planners recognized the inconsistencies in attempting to serve as both combatants and relief agents. Prosecution of criminals of either party to the conflict appears to favor one side in the conflict. In a pure peacekeeping role, absolute neutrality is the ideal tactical environment for American forces.

³⁵¹Tadic Brief, *supra* note 279, at 22 (copy on file with the author).

³⁵²John Pomfret, *Atrocities Leave Thirst for Vengeance in Balkans*, WASH. POST, Dec. 18, 1995, at A1 [hereinafter *Thirst for Vengeance*] (the cited article is the second in a three part series entitled *Between War and Peace: Seeking Justice for the Balkans*).

On a pragmatic note, prompt prosecutions are also more likely to succeed. The goal of prosecution is to fix responsibility on culpable parties, which requires evidence. Prosecutors at Nuremberg screened some 100,000 captured documents for information, and introduced about 4000 into evidence at trial.³⁵³ By definition, commanders in operations other than war will seldom have access to documentary evidence maintained by a vanquished government. In the absence of documentary evidence, eyewitness accounts, physical evidence, pictures of injuries, and circumstantial corroboration become more critical. Floods of refugees compound the difficulty of collecting evidence.³⁵⁴ Commanders have some assets to help collect criminal evidence, but available evidence should be collected and used before the opportunity is lost.³⁵⁵

Finally, convicting the perpetrators of continuum crimes helps ensure the long-term success of the mission. For example, Serb and Croat leaders convinced followers to commit atrocities by arguing that crimes committed in World War II and

³⁵³Lieutenant Colonel H. Wayne Elliott (ret), *Nuremberg: The Final Act of the European War*, ARMY 22, 28 (December 1995).

³⁵⁴*Thirst for Vengeance*, *supra* note 352, at A17 (noting experts' estimates that the conflict in Bosnia has driven up to 3 million civilians from their homes).

³⁵⁵Christopher N. Crowe, Note, *Command Responsibility in the Former Yugoslavia: The Chances For Successful Prosecution*, 29 U. RICH. L. REV. 191 (1994).

before had gone unavenged.³⁵⁶ A Muslim refugee from Bosnia remarked that failures to punish early atrocities allowed so many more crimes to occur that prosecution would "look like a condemnation of a whole nation."³⁵⁷ The refugee predicted that condemning the entire nation would "create the conditions for a new war fifty years down the road."³⁵⁸ Prompt prosecutions can foster both the long and short-term objectives of the operation. In appropriate cases, deployed commanders should be able to prosecute continuum crimes in military commissions.³⁵⁹

However, if prompt prosecution of foreign nationals fosters mission accomplishment, the deployed commander has no practical options. Despite the aspirations of prominent scholars, a permanent international criminal court which might try continuum crimes with little notice remains a dream of dim conception.³⁶⁰ On the other hand, creating an ad hoc

³⁵⁶*Thirst for Vengeance*, *supra* note 352, at A17.

³⁵⁷David Wood, *U.N. War Crimes Charges Complicate Peace Talks Among Balkan Factions*, SACRAMENTO BEE, Sept. 29, 1995, at B9.

³⁵⁸*Id.*

³⁵⁹Robinson & Silliman, *supra* note 51; Robinson O. Everett, *Possible Use of American Military Tribunals to Punish Offenses Against the Law of Nations*, 34 VA. J. INT'L L. 289 (1994).

³⁶⁰See Robert B. Rosenstock, 1994 McLean Lecture on World Law: *The Proposal for an International Criminal Court*, 56 U. PITT. L. REV. 271 (1994) (comments by the legal counselor to the United States Mission to the United Nations); Vespasian V. Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37 (1950); Quincy Wright, *The Scope of International*

international tribunal to prosecute international offenses requires long delays which blunt the operational impact of prosecution. International tribunals require time to employ personnel, obtain funding, draft rules of procedure and evidence, and commence operations.

For example, over three years have elapsed since the United Nations Security Council resolved to prosecute individuals responsible for the atrocities in the former Yugoslavia.³⁶¹ The Tribunal has indicted a number of suspects,

Criminal Law: A Conceptual Framework, 15 VA. J. INT'L L. 561 (1975); James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140 (1994). But see Christopher L. Blakesley, *War Crimes: Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFF. 77 (Summer/Fall 1994).

³⁶¹Mark A. Bland, Note, *An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects*, 2 IND. J. GLOBAL STUD. 233 (1994) (recounting the adoption of Security Council Resolution 808 on February 22, 1993, followed by the Statute of the International Tribunal on May 25, 1993, followed by a six month delay before the Tribunal convened its first ceremonial session on November 17, 1993. As of this writing, the first trial is scheduled to begin in the summer of 1996). The leader of the Bosnian Serbs, Radovan Karadzic makes no secret of his contempt for the tribunal, in spite of or perhaps because of the indictment against him for atrocities in the former Yugoslavia. John Pomfret, *Bosnian Serbs' Leader Stages Show of Defiance; Karadzic Tour Ends Months of Seclusion*, WASH. Post, Feb. 10, 1996, at A1 (quoting the leader's assessment of the tribunal, "[t]his is ridiculous. It is shameful what they are doing. They are accusing the political and military leadership without a shred of evidence. It is not a court or a tribunal. It is a form of lynching for the whole nation.").

but has not concluded a single trial to date. International tribunals can contribute to the development of the law, but their inherent delays and political pressures nullify any operational effect for the deployed commander during operations other than war. If nothing else, such lengthy delays create apathy in the minds of criminals which complicates the soldier's tasks. From the commander's perspective, international tribunals have very limited or nonexistent operational impact.

Even though United States courts retain concurrent jurisdiction with international tribunals, military forums are the only workable option for a deployed commander. In theory, United States district courts could exercise jurisdiction over foreign nationals no matter how the United States obtained custody of the offender.³⁶² Federal law already criminalizes some continuum crimes, but Congress would need to vest additional jurisdiction in the federal courts.³⁶³ Assuming that

See also Terry Atlas, Atrocity Docket: U.N. Has Done Little to Prosecute Villains in Bosnia, CHI. TRIB., Feb. 13, 1994, at 1.

³⁶²United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (restating the doctrine of Kerr v. Illinois, 119 U.S. 436 (1886) that a federal court could try a defendant who had been kidnapped and returned to the United States for trial); United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992) (dismissing the former dictator's claim that he was a prisoner of war who could not be tried for violations of United States drug trafficking laws).

³⁶³U.S. CONST. art. I, § 8, cl. 10 (giving Congress authority to "define and Punish Offenses against the Law of Nations."). See

there was a statutory basis for prosecution, the military could apprehend the offenders and return them to the United States for trial in Federal District Court.³⁶⁴ This option would also require the commander to gather all relevant evidence and witnesses needed for trial and send them to the United States as well. This unwieldy process would be too expensive, cumbersome, and lengthy to be of any practical benefit.

also Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define ... Offenses Against the Law of Nations"*, 21 VAND. J. TRANSNAT'L L. 865 (1988).

³⁶⁴Congress specified the venue for extraterritorial crimes in 18 U.S.C. § 3238 (1995). This statute is a venue statute, but does not create any jurisdictional limitations on military commissions. With regard to enforcing domestic criminal legislation, the Posse Comitatus Act prohibits use of military assets "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385 (1995). If Congress wants Article III courts sitting in the United States to prosecute continuum crimes, the domestic statute should allow military apprehension of suspects. In general, the Posse Comitatus Act, *codified* at 18 U.S.C. § 1385 (1995), does not have any extraterritorial effect. Opinion of the Office of the Legal Counsel, United States Department of Justice, *Extraterritorial Effect of the Posse Comitatus Act*, Nov. 3, 1989 (copy on file with the author). On the other hand, some scholars argue that United States apprehensions of foreign nationals would violate American obligations under the Civil and Political Covenant. *Extraterritoriality of Human Rights Treaties*, *supra* note 7, at 80. Even though the restrictions of Posse Comitatus do not apply overseas, some courts have hinted that the statutory restraints contained in 10 U.S.C. §§ 371-380 (1995) would restrict the law enforcement efforts of deployed forces. *See, e.g., United States v. Kahn*, 35 F.3d 426, 430 (9th Cir. 1994).

On the other hand, Article III courts have no overseas jurisdiction without express statutory authority.³⁶⁵ In *United States v. Noriega*,³⁶⁶ the district court set out a two-part test for claims of extraterritorial jurisdiction. Armed with domestic legislation specifying extraterritorial effect, district courts could prosecute continuum crimes because the United States has the power to proscribe universal jurisdiction offenses.³⁶⁷ Even if Congress passed such a statute, the foreign government would need to agree to allow an Article III court to function on its soil.³⁶⁸ Experience shows that commanders will not have access to civilian judicial assets during overseas deployments even in areas within United States

³⁶⁵ See generally Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment-Ex-Servicemen, Civilian Employees and Dependents*, 13 JAG L. REV. 184 (1971); Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 Wm. & Mary L. Rev. 1 (1986) [hereinafter *Hijacking Trials*]. Cf. Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971). Paust argues that a "federal district court may apply the international law of war under existing rules to trials of civilians." By analogy, Paust might argue that district courts have inherent authority to prosecute violations of international law committed by foreign nationals.

³⁶⁶ 746 F. Supp. 1506 (S.D. Fla. 1990).

³⁶⁷ *Id.* at 1512.

³⁶⁸ Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 163 (1995) [hereinafter Gibson, *Extraterritorial Jurisdiction*]; *Hijacking Trials*, *supra* note 365, at 85 (Article III courts operating overseas are limited by the "ultimate legal authority" of the foreign government").

special maritime or territorial jurisdiction.³⁶⁹ Finally, even after all these drawbacks, federal courts have procedural rules which would make prosecutions in the midst of a military operation a practical impossibility.³⁷⁰

Military forums are therefore the only workable option for timely prosecutions of continuum crimes. Commanders deployed on operations sanctioned under Chapter VII of the United Nations Charter can gain subject matter jurisdiction for military commissions pursuant to that authority. However, Congress should exercise American sovereign rights by giving deployed commanders authority to convene trials on their own

³⁶⁹Telephonic interview with Lieutenant Colonel Richard Jackson, February 14, 1996. Lieutenant Colonel Jackson served in the Office of the Staff Judge Advocate, United States Atlantic Command throughout the detainee operations at Guantanamo Bay, Cuba. Cuban detainees committed crimes against each other which threatened to destabilize the already restless camps. The commander requested judicial support, but no civilian judge ever deployed to help maintain order. In contrast, military judges were prepared to deploy to Somalia to support operations within forty-eight hours of a request from United States forces. United States Army Legal Services Agency Memorandum, Subject: Military Judge Support (22 Dec. 1992) (identifying Colonel Peter Brownback as the judge identified for deployment to Somalia upon the commander's request).

³⁷⁰Gibson, *supra* note 368, at 162-70. See also *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin, 1979) (holding that United States constitutional guarantees apply to a foreign citizen being tried before an American court sitting overseas, but applying analysis which is inconsistent with the later Supreme Court opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)).

authority during operations other than war. Because commanders can already punish violations of the laws of war during international armed conflict, punishing continuum crimes during operations other than war would add symmetry to the UCMJ. Commanders would then have the discretion to prosecute selected cases as the needs of the mission dictate.

B. Deter Misconduct By Regime Elites

The twentieth century has been the "Age of Atrocity" because of the existing gap between state behavior and the standards of international law.³⁷¹ United States policy has long supported "the rule of law which respects and protects without fear or favor the rights and liberties of every citizen and provides the setting in which the human spirit can develop in freedom and diversity."³⁷² At the same time, regime elites have instigated heinous violations of international law despite torrents of international condemnation.

For example, the Khmer Rouge murdered millions of Cambodians.³⁷³ Almost twenty years later, Congress passed the

³⁷¹Louis Rene Beres, *Prosecuting Iraqi Crimes: Fulfilling the Expectations of International Law After the Gulf War*, 10 Dick. J. Int'l L. 425 426 (1992).

³⁷²*Declaration on Human Rights*, Address by President Bush, July 15, 1989, 89 DEP'T OF STATE BULLETIN 1 (Sept. 1, 1989).

³⁷³Meron, *supra* note 40, at 554.

Cambodian Genocide Justice Act to "support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity."³⁷⁴ More recently, Saddam Hussein relocated large numbers of Kurds and launched massive chemical strikes on Kurdish villages.³⁷⁵ For the past half century, no foreign policymaker has faced personal criminal liability under international law. Prosecuting continuum crimes in military forums would narrow the gap between idealistic rhetoric and hard reality.

United States forces deploy to unstable environments. During operations other than war, enemy forces or political officials have often committed continuum crimes and other human rights abuses. The political-military objective often seeks to replace anarchy with peace and order. Prosecuting the officials responsible for human rights violations can be a key part of the overall success of the mission.

A Haitian official, for example, feels that "the whole purpose is to end the impunity that made these crimes possible otherwise, it [the military operations in Haiti] will mean

³⁷⁴Cambodian Genocide Justice Act, Pub. L. No. 103-236, 108 Stat. 486 (Apr. 30, 1994).

³⁷⁵Beres, *supra* note 371, at 436-38.

little."³⁷⁶ In the same vein, an American official commented that prior to the Lebanon disaster, the United States substituted rhetoric for substance.³⁷⁷ As a result, "[w]e carried a big stick and blew hard."³⁷⁸ American commanders should wield a policy tool to replace shrill cries of protest with the power of personal punishment for the perpetrators of continuum crimes.

Exercising jurisdiction over foreign policy makers could be a tangible step towards restoring order and respect for the rule of law. The faster that the mission is completed, the sooner United States Armed Forces redeploy home, and the smaller the cost to American taxpayers. Foreign officials who deliberately commit continuum crimes need to understand that they face personal accountability for their actions. They will be unable to cloak themselves in the inadequacies of the local judiciary or their exalted station in the former regime.

Likewise, the ability of American forces in the field to promptly prosecute violations will help deter further criminal acts. Adolf Hitler, for example, once dismissed arguments

³⁷⁶Douglas Farah, *Haitians Feel Sweet Sorrow at U.S. Departure*, WASH. POST, Feb. 9, 1996, at A25 (commenting on the barely functional court system, decaying courthouses, and poorly trained police forces).

³⁷⁷Thomas L. Friedman, *America's Failure in Lebanon*, N.Y. TIMES, Apr. 8, 1984, at Sec. 6, page 32.

³⁷⁸*Id.*

against killing Jews with the rhetorical question, "[w]ho after all, remembers the Armenians?"³⁷⁹ Common sense reveals that the threat of credible, effective sanctions must exist if the force of law is to remain a viable check on human activity.

Regime elites who have no fear of personal liability do not regulate their conduct in accordance with abstract expectations of international law. Anarchy and misery result when the force of law cannot constrain evil policy makers.³⁸⁰

³⁷⁹Madeleine K. Albright, *Bosnia in Light of the Holocaust: War Crimes Tribunals*, Address At the U.S. Holocaust Memorial Museum (April 18, 1994), 5 DEP'T OF STATE DISPATCH 209 (Apr. 18, 1994). Hitler referred to the historical fact that in 1894, Turkish regular troops paired with Kurds to kill 200,000 Armenians, and in 1915, the Armenians lost another 1.5 million people, which was more than 50% of the population at the time. Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, 72 FOREIGN AFF. 110, 113 (Summer 1993). See also Richard G. Hovannisian, *Etiology and Sequelae of the Armenian Genocide*, in GENOCIDE 111-41 (George J. Andreopoulos ed., 1994).

³⁸⁰George C. Marshall deployed to the Philippines as a young officer to participate in the brutal campaign against the rebels. He remarked that "[o]nce an army is involved in war, there is a beast in every fighting man which begins tugging at its chains, and a good officer must learn early on how to keep the beast under control, both in his men and himself." LEONARD MOSLEY, MARSHALL: HERO FOR OUR TIMES 23 (1982). Many scholars have advocated implementing the provisions of Article 43 of the United Nations Charter in order to give the Secretary General a standing military force to more effectively and quickly implement the desires of the Security Council. Member states would be obligated in advance to provide forces to the Secretary General on an "on call" basis, which proponents maintain would strengthen the rule of law by giving Security Council decisions more speedy and effective implementation.

The process of "engaging" regime elites with the basic principles of the rule of law and democracy is one of America's most powerful foreign policy tools.³⁸¹

I do not mean to imply that prosecutorial power is in itself sufficient to deter criminal elites. Quite the contrary, a lasting and just peace may require the use of armed force to stop atrocities and widespread human rights violations.³⁸² American paratroopers were prepared to enter Haiti and use military power to coerce the Cedras regime into restoring the rule of law.³⁸³ The use of armed force is even more legitimate when authorized by United Nations mandate.

See James E. Rossman, Note, *Article 43: Arming the United Nations Security Council*, 27 N.Y.U. J. INT'L L. & POL'Y 227 (1994); Agenda for Peace, *supra* note 95, ¶ 44; Lawrence I. Rothstein, Note, *Protecting the New World Order: It Is Time To Create A United Nations Army*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 69 (1993).

³⁸¹John N. Moore, *Low Intensity Conflict and the International Legal System*, in U.S. NAVAL WAR COLLEGE, 67 INTERNATIONAL LAW STUDIES 25, 36 (Alberto R. Coll et al. eds., 1995) [hereinafter *Low Intensity Conflict*]. See also *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, June 1990, U.S. Commission on Security and Cooperation in Europe, Washington, D.C.

³⁸²Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 S. ILL. U. L.J. 131 (1994). In the words of the Secretary General of the United Nations, "[w]hile such action should only be taken when all peaceful means have failed, the option of taking it is essential to the credibility of the United Nations as a guarantor of international security" Agenda for Peace, *supra* note 95, ¶ 43.

However, during peace operations, there are many occasions when the use of overt force would be wrong.³⁸⁴ At the other extreme, ignoring ongoing continuum crimes would be the functional equivalent of appeasement.³⁸⁵ The ability to prosecute selected cases would provide a middle ground between using massive force to punish wrongdoers and doing nothing. The political circumstances would combine with tactical considerations to guide the commander in deciding how aggressive American forces should be in apprehending and

³⁸³CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995 13 (1995) [hereinafter LAW AND MILITARY OPERATIONS IN HAITI].

³⁸⁴See FM 100-5, *supra* note 16, at 13-4 ("Restraints on weaponry, tactics, and levels of violence characterize the environment [operations other than war]. The use of excessive force could adversely affect efforts to gain legitimacy and impede the attainment of both short and long-term goals.") ("Committed forces must sustain the legitimacy of the operation and of the host government. Legitimacy derives from the perception that constituted authority is both genuine and effective and employs appropriate means for reasonable purposes.").

³⁸⁵Paust, *supra* note 382, at 131. In the context of ongoing operations inside Bosnia, NATO officials are concerned that continued sniping and shelling will erode civilian confidence in their mission. In early January 1996, Serb snipers shot an Italian soldier, engaged in several small arms attacks against NATO soldiers and equipment, and fired on a Sarajevo streetcar with a 64mm anti-tank weapon. Tom Squitieri, *NATO Talking Tough in Bosnia: Responds to Sarajevo Attack*, USA TODAY, Jan. 11, 1996, at A6. A spokesman stated that "[A]ny further loss of life of such incidents only further hampers the peace process." *Id.*

prosecuting foreign nationals. The international basis for prosecution is clear, and Congress should not deny deployed commanders a useful operational option for punishing continuum crimes which impact the mission of United States forces.

C. Increasing Respect for the Rule of Law

Professor Dinstein noted the distinction between individual crimes and system crimes.³⁸⁶ Because regime elites control the political and military institutions, holding them accountable for the crimes that they condone or order is the most effective way of deterring widespread, systematic crimes. However, large-scale criminal violations still depend on individual actors who are willing to disregard basic principles of humanity and perpetrate the crimes. In a wider sense, prosecuting continuum crimes would help deter individual crimes by increasing respect for the rule of law.

At the state level, promoting the rule of law means strengthening democratic ideals and institutions.³⁸⁷ By definition, democratic institutions foster respect for human freedom and dignity. However, abstract respect for human rights means little unless individual actions conform to established standards. Even if an individual does not have a

³⁸⁶Dinstein, *supra* note 263, at 348.

³⁸⁷*Low Intensity Conflict*, *supra* note 381, at 357 n.23.

detailed knowledge of international law, continuum crimes involve basic human rights.³⁸⁸ The United States can prosecute universal jurisdiction offenses without proving that the individual had specific knowledge of an exact provision of international law and then made a willful decision to violate that provision.

In a tactical environment, the rule of law constrains individual actors by restricting their freedom of choice. For example, despite rationalization and arguments of expediency, torture, murder, and other continuum crimes are fundamentally evil actions on a personal level. The function of law is to increase the likelihood that "soldiers [can] be counted on to do what is right, even when no one is watching."³⁸⁹ Prosecuting

³⁸⁸The Geneva Conventions require training in the laws of war, even though soldiers already know that the basic rules regulating human relations preclude the same conduct regulated as grave breaches under the Conventions. See FM 27-10, *supra* note 4, para. 14(signatories undertake "in time of peace as in time of war, to disseminate the text of the Present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military instruction."); H. Wayne Elliott, *Theory and Practice: Some Suggestions for the Law of War Trainer*, ARMY LAW. 1, July 1983.

³⁸⁹FM 100-5, *supra* note 16, at 14-2. The cornerstone doctrine of the United States Army recognizes the importance of the human dimension of conflict. Thus, despite "the difficult environments in which Army forces operate, soldiers are expected to obey the laws of land warfare, to protect civilians and other noncombatants, to limit collateral damage, to respect private property, and to treat EPWs with dignity. Amid the

continuum crimes would help convince individual soldiers that basic rules of human relations are not simple devices of expediency. Effective criminal sanctions for continuum crimes increase the personal incentive for individuals to respect fundamental human rights.

Foreign nationals who covet discretion to commit continuum crimes could argue that United States prosecutions would violate their sovereign rights. The criminal school of thought would attempt to portray United States prosecution as an example of legal imperialism. Some foreign governments would likely argue that the United States has no inherent moral or legal right to prosecute continuum crimes.

Despite these potential objections, the United States has authority to proscribe and prosecute the universal jurisdiction offenses I term continuum crimes. The United States would not unilaterally create new law, but would exercise its existing rights under international law. The nature of universal jurisdiction offenses allows any state to establish domestic jurisdiction over perpetrators.³⁹⁰ Translating abstract legal rights into concrete enforcement is a logical, and indeed necessary, corollary to the very notion of law itself.

rigors of combat, the integrity of every soldier -from the highest to the lowest ranks- is of paramount importance." *Id.*

³⁹⁰ See *infra* notes 413 to 416 and accompanying text for a discussion of the basic judicial guarantees recognized by civilized nations throughout the world.

For the same reasons, clear domestic jurisdiction over continuum crimes would discredit arguments that prosecutions are an exercise of "victors justice." A defined jurisdictional basis under domestic law decreases reliance on ad hoc tribunals. The nature of continuum crimes as a component of the established military justice system would acknowledge the force of international law while undermining arguments that criminal accountability resulted from an arbitrary exercise of military power.³⁹¹ During future deployments, commanders would have a preexisting tool which no accused or lawyer could claim was created to achieve a particular result against a selected suspect in a particular setting. Amending the UCMJ would therefore increase the legitimacy and moral authority of United States forces deployed on operations other than war.

Finally, enforcing the standards of international law also could increase the discipline and morale of United States

³⁹¹This is the same logical and moral foundation which compels some scholars to advocate the creation of a permanent international criminal tribunal. See, e.g., M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 34 (Spring 1991) ("We cannot rely on the sporadic episodes of the victorious prosecuting the defeated and then dismantle these ad hoc structures as we did with the Nuremberg and Tokyo tribunals. The permanency of an international criminal tribunal actin impartially and fairly irrespective of whom the accused may be is the best policy for the advancement of the international rule of law and for the prevention and control of international and transnational criminality.").

forces. The American people demand a high quality force that always honors the core constitutional values of "strong respect for the rule of law, human dignity, and individual rights."³⁹² Enemy forces, in contrast, have often openly and repeatedly violated numerous provisions of the laws of war.³⁹³ Although American soldiers face courts-martial for violations of international law,³⁹⁴ existing UCMJ provisions restrict commanders' ability to punish foreign nationals for similar violations.

³⁹²FM 100-5, *supra* note 16, at 14-2.

³⁹³See LOUIS HENKIN ET AL., *MIGHT V. RIGHT* (2d ed. 1991). During the Vietnam War, the North Vietnamese Army regularly committed many command directed atrocities. Howard Levie, *Maltreatment of Prisoners of War in Vietnam*, 98 B.U. L. REV. 323 (1969). The North Vietnamese repeatedly executed American prisoners of war as illegal reprisals following valid convictions of Vietcong in South Vietnamese courts. FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 193-200 (1971). During the Korean conflict, General MacArthur convened a war crimes commission which documented massive war crimes committed by North Korean and Chinese soldiers. The commission prepared cases for trial which documented the torture and murder of prisoners. No enemy soldiers ever faced trial due to fears that trials would interfere with efforts to repatriate prisoners. PAUL CHRISTOPHER, *THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES* 136-37 (1994).

³⁹⁴FM 27-10, *supra* note 4, para. 507b ("Violations of the Law of War committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice, and, if so, will be prosecuted under that Code. Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished."). For a description of some United States prosecutions see VON GLAHN, *supra* note 94, at 882-85.

At the very least, the disparate standards tend to undermine American soldiers' respect for the law. Rather than an unqualified acceptance of the norms and values embodied in legal standards, soldiers come to view the law as a meaningless set of arbitrary standards. Instead of viewing the law as an inherent and valid component of the mission, some soldiers come to view international law as an unfair impediment to the accomplishment of the mission.³⁹⁵

At its worst, disparate enforcement can lead American soldiers to rationalize criminal violations of their own. The

³⁹⁵Colonel John Waghelstein wrote that fighting a counterinsurgency in which the enemy disregards legal standards is difficult for the American military because "this kind of conflict is fundamentally different from the American way of war." *Post-Vietnam Counterinsurgency Doctrine*, MILITARY REVIEW 42 (May 1985). Soldiers who feel no obligation to obey legal standards are also more likely to disregard their rules of engagement. Few senior leaders in Vietnam felt that soldiers understood their rules of engagement before My Lai, and even fewer believed that soldiers carefully followed those rules of engagement. Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 19 (1994). Perceiving that rules of engagement unduly restricted their freedom of action, soldiers engaged in "creative application" or ignored the legal restrictions altogether. ANDREW F. KREPINOVICH, JR., *THE ARMY AND VIETNAM* 199-206 (1986). See generally MICHAEL MCCLINTOCK, *INSTRUMENTS OF STATECRAFT: U.S. GUERRILLA WARFARE, COUNTER-INSURGENCY, AND COUNTER-TERRORISM 1940-1990* 421-49 (1992) (describing the arguments made by some soldiers and civilian policymakers advocating a legitimate role of terror techniques and human rights abuses as a part of United States military and political policy).

perception that the enemy refuses to obey the law can prompt the response "Why should I care about the rules if the enemy doesn't?"³⁹⁶

Therefore, effective prosecution of foreign nationals could deter further violations by hostile forces, and would complement existing mechanisms for preventing violations on the part of United States forces. In any case, prosecuting continuum crimes would help protect fundamental human rights, enhance the rule of law, and contribute to the successful formation of democratic values.

D. Protecting United States Personnel

Finally, clear authority to prosecute continuum crimes could help deployed commanders fulfill their inherent obligation to protect United States Armed Forces. The Standing Rules of Engagement for United States Armed Forces declare in bold, capital letters that "[T]hese rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other US forces in the vicinity."³⁹⁷ The commander's right to protect the force is a

³⁹⁶My Lai Lessons, *supra* note 13, at 175.

³⁹⁷SECRET, Chairman of the Joint Chiefs of Staff, Instruction 3121.01, Standing Rules of Engagement for US Forces (1 Oct 1994) (The cited language comes from the unclassified Appendix A

logical extension of every soldier's inherent right of self defense.³⁹⁸ Commanders can detain foreign nationals in the interests of force protection.

To contain known threats to the force, commanders have detained foreign nationals during most operations other than war. Commanders have operated detention facilities in response to intelligence reports that some individuals pose threats to the force.³⁹⁹ Commanders detained foreign nationals during Operations Urgent Fury,⁴⁰⁰ Just Cause,⁴⁰¹ Restore Hope,⁴⁰² and

which is intended for wide distribution to all forces in the field.)).

³⁹⁸The 1983 terrorist attack against United States Marines in Beirut caused a fundamental institutional change in subsequently promulgated Rules of Engagement. Each set of ROE reminds every soldier of the inherent right of self defense up front and in capital letters. Martins, *supra* note 395, at 51-52.

³⁹⁹LAW AND MILITARY OPERATIONS IN HAITI, *supra* note 383, at 63. Both Military Intelligence and Criminal Investigative Detachment assets may initially investigate some incidents. The primary responsibility of the military intelligence assets is to examine such incidents for intelligence and security-related purposes. DEP'T OF ARMY, REGULATION 381-20, THE ARMY COUNTERINTELLIGENCE PROGRAM, para. 4-5 (15 Nov. 1993). By doctrine, military intelligence will exhaust all intelligence/security dimensions of an incident before turning the case over to the criminal investigators. *Id.* There is no regulatory prohibition against using evidence obtained during the initial intelligence processing of an incident.

⁴⁰⁰Colonel Ted Borek, *Legal Services in War*, 120 MIL. L. REV. 19, 47 (1988) (describing the role of judge advocates in detainee issues during operations in Grenada).

Uphold Democracy.⁴⁰³ Operational necessity forced commanders to detain foreign nationals in response to actual or perceived threats against United States forces.⁴⁰⁴ At the same time, commanders often had some evidence that detained individuals had committed continuum crimes.⁴⁰⁵

Prosecuting selected cases would allow commanders to protect their forces even as the overall security threat

⁴⁰¹Parkerson, *supra* note 9, at 68-71. During operations in Panama, early estimates placed the figure of detainees at around 5000. *Id.* at 68 n.191.

⁴⁰²Lorenz, *supra* note 9, at 34-35 (summarizing the legal problems encountered during operations in Somalia). The Joint Task Force established a detention facility capable of holding 20 Somalis.

⁴⁰³LAW AND MILITARY OPERATIONS IN HAITI, *supra* note 383, at 63-72. During operations in Haiti, the Joint Detention Facility became "one of the most conspicuous successes of Uphold Democracy" because the standards of humane treatment and due process stood in marked contrast to Haiti's legacy of arbitrary and sometimes brutal detention." *Id.* at 64. One judge advocate remarked that, "ICRC personnel became strong supporters of the JDF when criticism arose from the media and several detainee families." *Id.* The population at the Multinational Force Joint Detention Facility crested at around 200, but decreased to around 24 by January 1995 at the time Haitian officials began to assume control of the facility. *Id.* at 67.

⁴⁰⁴At the time of this writing, an American serviceman lies wounded in Bosnia at the hands of a local civilian looter. Implementing the recommendations of this thesis would allow prosecution in an American military forum in the event that the NATO forces apprehend the shooter and produce sufficient evidence to sustain a conviction.

⁴⁰⁵LAW AND MILITARY OPERATIONS IN HAITI, *supra* note 383, at 63.

declines. After Operation Just Cause, some human rights groups criticized United States commanders on the basis that "[o]nce the security threat was over, the legal basis for the United States forces to detain, arrest, and search civilians was at best tenuous."⁴⁰⁶ Even though the operational climate becomes secure, some individuals remain direct or indirect threats to the force. In those cases, commanders will seldom find a local judiciary which is willing and able to provide suspects with fair justice. Rather than freeing the suspect to injure United States or allied forces, the commander should be able to prosecute the suspect for known continuum crimes.

Authority to prosecute suspects for continuum crimes raises some tactical and practical concerns. There will be cases which the commander decides not to prosecute because of a lack of evidence, as well as potential short term escalation of hostilities, or other operational concerns. In other cases, the commander may grant some form of leniency in exchange for a tactical or political concession by opposing forces. In still other cases, the commander may decide to turn the suspect over to local criminal authorities.⁴⁰⁷

⁴⁰⁶Parkerson, *supra* note 9, at 69 (describing a report issued by America's Watch that United States forces improperly detained some citizens solely due to their political beliefs).

⁴⁰⁷The commander should not turn over prisoners to local officials without some evidence that the local standards of incarceration comply with the basic humanitarian standards. See, e.g., Standard Rules for the Treatment of Prisoners,

While local officials may accept custody of prisoners following their conviction, the commander's only option may be to incarcerate the suspect in the United States following conviction.⁴⁰⁸ During present operations, the commander must choose between releasing individuals who pose known threats or violating their fundamental human rights by holding them indefinitely without trial.⁴⁰⁹ In any case, the commander

adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and The Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. Res. 663C, 24 U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977).

⁴⁰⁸Confining foreign nationals in United States federal or military prisons is not unknown. Several thousand Cuban citizens came to the United States during the Mariel Boat Lift and some spent years in federal penitentiaries before being returned to Cuba or released. Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans*, 62 S. CALIF. L. REV. 1733 (1989). Bringing foreign nationals to the United States would require coordination with and special status granted by the Immigration and Naturalization Service.

Another option would be to follow the example of the Statute for the current International Tribunals by confining convicted continuum criminals in any state which indicates a willingness to accept prisoners. Report of the Secretary General, *supra* note 172, ¶ 122. In this scenario, prisoners would be eligible for parole, commutation, or other post conviction action in accordance with the laws of the confining state. *Id.*

⁴⁰⁹Universal Declaration, *supra* note 192, art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile."). The freedom from arbitrary arrest is a fundamental human right as expressed in all major human rights instruments beginning with

should have the flexibility of selecting the course which most enhances the mission while protecting the force.

VII. Proposed Revisions to the Uniform Code of Military Justice

American military commanders should have a statutory basis for prosecuting foreign nationals who violate provisions of international law. The evolving nature of deployments is prompting a reevaluation of the doctrine which guides the deployment of American forces.⁴¹⁰ Given the doctrinal and structural changes which will govern the use of American military power into the twenty-first century, prosecuting continuum crimes could serve an important function in future operations. Congress should amend the UCMJ as an exercise of American sovereignty to assist commanders in the field.

Amending Article 21 of the UCMJ would give commanders autonomy to prosecute selected cases as the needs of the mission dictate. Although some military lawyers view Article

the Magna Carta (1215) and the French Revolution (1789). In the words of the Magna Carta, "No free man shall be taken or imprisoned or disseised or out lawed or exiled or in any way ruined, nor we go or send against him, except by lawful judgment of his peers, or by the law of the land." Johanna Niemi-Kiesilainen, Article 9, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 147 (Asbjorn Eide et al. eds., 1991).

⁴¹⁰Comments on National Public Radio, Mar. 19, 1996, comments by Andrew Krepinovich.

21 as an outmoded relic,⁴¹¹ it can provide commanders a powerful tool to assist accomplishment of their mission during operations other than war. Given the potential practical benefits and sweeping force of law supporting domestic prosecution of continuum crimes, the requisite change is strikingly simple. Congress need change only one word of Article 21. The revised Article 21 would allow military commission jurisdiction over offenses defined by statute or the "law of nations."⁴¹²

⁴¹¹Several years ago, the Chief of the Operations and International Law Department at the United States Army Judge Advocate General's School, Charlottesville, Virginia received a telephone inquiry regarding the desirability of retaining Article 21 in the Code. The caller was soliciting opinions as to whether Article 21 had any practical utility in modern operations. Interview with Lieutenant Colonel H. Wayne Elliott (ret) (Jan. 6, 1996).

⁴¹²There is some support for an alternative view that Congress need not modify Article 21 in order to allow prosecution of continuum crimes. The statute allows prosecution of "offenders or offenses that by statute or **by** the law of war may be tried by military commissions, provost courts, or other military tribunals." MCM, *supra* note 44, art. 21(emphasis added). If Congress does not amend the statute, the President could make an authoritative determination that the phrase "by the law of war" has a functional meaning. In other words, the President could issue a change to the Manual for Courts-Martial specifying that Article 21 incorporates the same offenses which the Security Council described as "violations of the laws or customs of war." I do not believe that the history of military tribunals in United States jurisprudence or the rules of international law warrant such a broad and ambiguous interpretation of the phrase. The better approach in my opinion is to amend Article 21 and make the jurisdictional basis absolutely clear to both potential criminals and their defense attorneys.

Incorporating continuum crimes under the jurisdiction of Article 21 would allow military commissions to prosecute offenses which "strike at the very roots of civilized society."⁴¹³ Military commissions would provide a fair forum in accordance with "the broad principles of justice and fair play which underlie all civilized concepts of law and procedure."⁴¹⁴ Even though international law does not specify a particular code of criminal procedure or evidence, the President could fill that void by issuing uniform procedures for military commissions.⁴¹⁵ In any event, United States military

⁴¹³John W. Bridge, *The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law*, 13 INT'L & COMP. L.Q. 1255 (1964), reprinted in RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 867-82 (2d ed. 1991) (quoting Professor Schwarzenberger without reference to a specific citation).

⁴¹⁴McDougal and Feliciano, *supra* note 223, at 721.

⁴¹⁵The lack of defined procedures and rules of evidence for military commissions could generate charges of "victor's justice." To prevent this perception, the President should exercise the constitutional authority, U.S. CONST., art. II, § 2, cl. 1, to issue regulations for pretrial, trial, and post-trial procedures, including modes of proof for military commissions which "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts..." UCMJ, *supra* note 44, art. 36. In the absence of procedural guidance from the Commander-in-Chief, military commissions and provost courts "shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." MCM, *supra* note 44, Part I, para. 2(b)(2).

commissions would provide what some scholars regard as "internationally recognized standards regarding the rights of the accused at all stages."⁴¹⁶

⁴¹⁶The Secretary General's Report required by United Nations Security Council Resolution 808 used the quoted phrase with regard to the rights enunciated in Article 14 of the International Covenant on Civil and Political Rights. Report of the Secretary General, *supra* note 172, ¶ 106. The Statute of the International Tribunal for Crimes Committed in the Former Yugoslavia accordingly provides that the accused has the following rights:

- (1) All persons shall be equal before the International Tribunal.
- (2) In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute.
- (3) The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
- (4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and

The intricate relationship between political and military objectives during operations other than war requires a procedural limit to the power of a local commander. The idea of civilian control over United States military forces is an integral facet of American law.⁴¹⁷ The local commander should not be able to convene a military commission to try a foreign national without first completing a coordination procedure specified by the President through the Manual for Courts-Martial.

Coordination with civilian and policy officials outside the deployed command also would help ensure the fairness of the proceedings. After a determination by the commander that prosecution would support the mission, civilian policy officials should review the facts to balance the impact of prosecuting continuum crimes against the necessary, albeit

examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

Id. ¶ 107, Statute of the International Tribunal, *supra* note 172, art. 21.

⁴¹⁷Charles J. Dunlap, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994).

limited, invasion of host nation sovereignty.⁴¹⁸ Prosecution should be a deliberate policy choice made by the civilian officials responsible for coordinating overall United States foreign policy.

On a related note, military commission jurisdiction over continuum crimes would not violate other United States obligations under international law. The Geneva Conventions require that prisoners of war can be prosecuted under domestic law "only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."⁴¹⁹ There is some support for a technical argument that United States servicemembers are subject to trial by military commission for

⁴¹⁸See, e.g., RESTATEMENT, *supra* note 12, § 206 ("Under international law, a state has sovereignty over its territory and general authority over its nationals."); *Id.* at cmt. b. (sovereignty implies a state's lawful control over its territory generally "to the exclusion of other states, authority to govern in that territory, and authority to apply law there.").

⁴¹⁹Convention of Prisoners of War, *supra* note 4, art. 102. The Convention also states that "[p]risoners of war prosecuted under the laws of the detaining power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." *Id.*, art. 85. The Uniform Code of Military Justice implements this provision of international law by providing for court-martial jurisdiction over "Prisoners of war in custody of the armed forces." UCMJ, *supra* note 44, art. 2(a)(9).

violations of international law.⁴²⁰ In any case, persons in the custody of United States forces during operations other than war are not prisoners of war in the legal sense, and cannot claim the benefits of the Convention.⁴²¹

Finally, establishing jurisdiction over continuum crimes would not require the United States forces to assume the responsibilities of an occupying power. As an occupying power, international law would require American commanders to "take all measures in [their] power to restore, and ensure, as far as possible, public order and safety."⁴²² During an occupation, international law would require the commander to prosecute continuum crimes as a function of maintaining civil order.

⁴²⁰See DEP'T OF DEFENSE, LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES 17 (1951) ("Under [article 18 of the Manual for Courts-Martial] there is no question that members of our armed forces may be tried for violations of the law of war, either by military commission or by general courts-martial.").

⁴²¹The United States elected to treat potentially hostile persons detained during Operation Uphold Democracy as if they were prisoners of war based on a policy decision rather than a legal requirement. LAW AND MILITARY OPERATIONS IN HAITI, *supra* note 383, at 54. As a matter of policy, the United States has declared that it will "upon engagement of forces, apply all of the provisions of the Geneva Conventions and the customary international law dealing with armed conflict." United States Permanent Mission in Geneva, Diplomatic Note to the International Committee of the Red Cross (Sept. 19, 1994), *quoted in Extraterritoriality of Human Rights Treaties*, *supra* note 7, at 78.

⁴²²Hague IV, *supra* note 218, art 52, reprinted in FM 27-10, *supra* note 4, para. 363.

However, military occupation is a question of fact which "presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority."⁴²³ Legal status as an occupying power would be inconsistent with the core objectives of operations other than war. Therefore, during peace operations, a modified Article 21 should give deployed commanders discretion to prosecute only those continuum crimes which would aid mission accomplishment. Appendix A contains a model Article 21 which would establish the necessary statutory basis for commanders to prosecute continuum crimes as the needs of the mission require.

VII. Conclusion

The seeds of future conflicts are rooted in the soil of human nature.⁴²⁴ The world will remain a dangerous place full

⁴²³FM 27-10, *supra* note 4, para. 355.

⁴²⁴Bob Marley paraphrased the words of a 1968 speech given by the Ethiopian emperor Haile Selassie to the United Nations:

Until the philosophy which holds one race superior and another inferior is finally and permanently discredited and abandoned, everywhere is war...and until there are no longer first-class and second class citizens of any nation, until the color of a man's skin is of no more significance than the color of his eyes, we see war. And until the basic human rights are equally guaranteed to all without regard to race, there is war. And until that day, the dream of lasting peace, world citizenship rule of

of unpredictable threats.⁴²⁵ In the midst of declining budgets, the United States military must remain effective in peace operations, while always retaining its core warfighting skills and focus.⁴²⁶ Including the authority to prosecute continuum crimes under Article 21 will be a decisive step towards helping commanders solve some of the problems looming during future deployments.

Prosecutions of foreign nationals can be an important part of future operations. George Will noted that "[t]he gap between ideals and actualities, between dreams and achievements, the gap that can spur strong men to increased exertions, but can break the spirit of others is the most conspicuous land mark in American history."⁴²⁷ Unless Congress

international morality, will remain but a fleeting illusion to be pursued, but never attained now everywhere is war.

BOB MARLEY, *War*, on RASTAMAN VIBRATION (Caedmon Recordings 1976).

⁴²⁵Senator Daniel Patrick Moynihan predicted that "the defining mode of conflict in the era ahead is ethnic conflict. It promises to be savage. Get ready for 50 new countries in the next 50 years. Most of them will be born in bloodshed." As *Ethnic Wars Multiply, U.S. Strives For a Policy*, N.Y. TIMES, Feb. 7, 1993, at A1.

⁴²⁶Earl H. Tilford, Jr., *Introduction*, in U.S. ARMY WAR COLLEGE, WORLD VIEW: THE 1996 STRATEGIC ASSESSMENT FROM THE STRATEGIC STUDIES INSTITUTE 6 (Earl H. Tilford ed., 1996).

⁴²⁷GEORGE F. WILL, STATECRAFT AS SOULCRAFT 98 (1989).

amends Article 21, Americans deployed in the future may pay the price for the existing gap in the commander's judicial power.

This thesis documents a sound basis for United States prosecution of continuum crimes. Echoing Justice Jackson's admonition at Nuremberg, the UCMJ should not remain static, but by continual adaptation should follow the needs of a changing world.⁴²⁸ Commanders cannot bridge the gulf between theory and practical, effective enforcement of well established international law without congressional action.

⁴²⁸1 IMT, *supra* note 2, at 221.

APPENDIX A

Proposed Article 21, Uniform Code Of Military Justice

10 U.S.C. § 821. Art. 21 Jurisdiction of Courts-Martial not
exclusive

(a) The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of nations may be tried by military commission, provost courts, or other military tribunals.

(b) Unless another provision of law specifically vests jurisdiction in another forum, military commissions have jurisdiction to try any person for a violation of the law of nations when that violation has a substantial or probable impact on the accomplishment of the military mission, or endangers the safety of United States citizens, provided that trial in a foreign forum is unlikely to remedy the impact of the crime defined under the law of nations.